

Case C-560/23 [Tang]ⁱ**Request for a preliminary ruling****Date lodged:**

8 September 2023

Referring court:

Flygtningenævnet København (Denmark)

Date of order for reference:

8 September 2023

Appellant:

H (assisted by DRC Dansk Flygtningehjælp)

Respondent:

Udlændingestyrelsen

FLYGTNINGENÆVNET (Refugee Tribunal, Denmark)

Request for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU)**Date lodged:** 8 September 2023**Referring court:** Flygtningenævnet [...]**Appellant:** H (assisted by DRC Dansk Flygtningehjælp (Danish Refugee Council))**Respondent:** Udlændingestyrelsen (Immigration Service, Denmark) [...]**Introduction**

- 1 The Refugee Tribunal has, pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU), decided to request the Court of

ⁱ The name of this case is a fictive name. It does not correspond to the true name of any of the parties.

Justice of the European Union to give a preliminary ruling on the interpretation of the rules on time limits set out in Article 29(1) [Or. 2] and (2) of the Dublin III Regulation (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, p. 31;] ‘the Dublin III Regulation’), in conjunction with Article 27 of that regulation.

- 2 The Dublin III Regulation, adopted in the light of the Treaty on the Functioning of the European Union, in particular Article 78(2)(e) thereof, is covered by the Danish opt-out and, under Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, the regulation does not have binding force for Denmark. The rules of the Dublin III Regulation do, however, apply in Denmark by virtue of a parallel agreement concluded on an intergovernmental basis and it follows from that parallel agreement that a request for a preliminary ruling may be made to the Court of Justice of the European Union; see Council Decision (EC) No 188/2006 of 21 February 2006 [(OJ 2006 L 31, p. 10)].
- 3 The Refugee Tribunal is requesting an expedited procedure in accordance with Article 105 of the Rules of Procedure of the Court of Justice of the European Union having regard to the nature of the case and the purpose of the Dublin III Regulation to provide a rapid determination of the Member State responsible for the processing of an application for international protection.

The competence of the Refugee Tribunal to make a reference

- 4 The Refugee Tribunal, which is established by law, is an independent, quasi-judicial collegiate body within the public administration. The Tribunal functions on a permanent basis as an administrative appeal body for the administrative decisions of the Immigration Service made at first instance in asylum matters, see *udlændingelovens § 53 a* (Paragraph 53 a of the Law on immigration).
- 5 The Refugee Tribunal’s organisational matters are governed by Paragraph 53 of the Law on immigration. The Refugee Tribunal consists of a president and a number of vice-presidents, all of whom are judges and whose independence is protected by the Danish Constitution. In addition, the Tribunal consists of a number of members, who are appointed on the recommendation of the Advokatrådet (Bar Council) and the Minister for Immigration and Integration respectively. The members of the Refugee Tribunal are appointed by the Presidency of the Refugee Tribunal for a 4-year term of office and their appointment may be renewed for a further term of 4 years. The Refugee Tribunal’s members are independent and may neither accept nor seek instructions from the appointing or examining authority or body and the provisions of the *retsplejeloven §§ 49-50* (Paragraphs 49 and 50 of the Court Rules of Procedure)

on access to appeal to Den Særlige Klageret (Special Board of Revision) concerning a judge also apply to the members of the Refugee Tribunal, see Paragraph 53(1), (2) and (3), and the members of the Tribunal can be appointed only by judicial decision, [Or. 3] see Paragraph 53(4), point 4, of the Law on immigration. The independence of all members of the Tribunal is thus guaranteed by legislation.

- 6 Specific cases are heard before the Tribunal's president or a vice-president, who presides over the hearing, a lawyer and an official from the department of the Udlændinge- og Integrationsministeriet (Ministry of Immigration and Integration), see Paragraph 53(6) of the Law on immigration. Decisions of the Tribunal are reached on the basis of a majority of votes and each member has a vote. The Tribunal's form of procedure is similar to that of a court and is *inter partes*, which means, inter alia, that the Tribunal may, during the investigation of the case, make rulings on the hearing of the person concerned and witnesses and the presentation of other pieces of evidence, and the Tribunal may appoint a lawyer for a person concerned who has not obtained legal representation for him or herself, see, more particularly, Paragraphs 54 and 55 of the Law on immigration. It follows from Paragraph 56(8) of the Law on immigration that the Refugee Tribunal's decisions are final. That means that the Tribunal's decisions cannot be challenged before another administrative authority and that access to judicial review of the Tribunal's decisions is very limited.
- 7 In light of the background set out above, the Refugee Tribunal regards itself as a 'court or tribunal' in accordance with Article 267 TFEU entitled to make a reference for a preliminary ruling to the Court of Justice of the European Union, in so far as the Tribunal is established by law, it is permanent, its jurisdiction is compulsory, its procedure is *inter partes*, it applies rules of law and it is independent, see, with regard in particular to the principles set out in the judgment of the Court of Justice of 24 May 2016 in *MT Højgaard A/S and Others* (C-396/14[, EU:C:2016:347]), paragraph 23.

Facts of the case

- 8 On 25 April 2021, the Afghan citizen H ('the person concerned') entered Denmark. On the same date, he submitted an application for international protection in Denmark. It appears from the Eurodac database that the person concerned was registered as an asylum seeker in Romania on 5 March 2021.
- 9 On 24 June 2021, the Immigration Service therefore requested Romania to take back the person concerned in accordance with Article 18(1)(c) of the Dublin III Regulation.
- 10 On 7 July 2021, Romania agreed to take back the person concerned in accordance with Denmark's request of 24 June 2021.

- 11 On 19 July 2021, the Immigration Service decided to transfer the person concerned to Romania pursuant to Article 18(1)(c) of the Dublin III Regulation. By a claim made on the same date, the person concerned appealed against that decision to the Refugee Tribunal. The complaint relied on the suspensive effect of Article 27(3)(a) of the Dublin III Regulation.
- 12 On 28 February 2022, Romania informed all Member States that, with effect from 1 March 2022, Romania wished to suspend all inbound **[Or. 4]** transfers under the Dublin III Regulation in the light of the conflict in Ukraine and the increased influx of refugees to Romania.
- 13 On 15 March 2022, the Refugee Tribunal remitted the case to the Immigration Service for fresh consideration thereof at first instance, inter alia for the Service to adopt a position on the effect of the Romanian authorities' general statement on the specific decision to transfer the appellant to Romania.
- 14 On 8 April 2022, the Immigration Service took a fresh decision to transfer the person concerned to Romania under Article 18(1)(c) of the Dublin III Regulation. By a claim made on the same date, the person concerned appealed against that decision to the Refugee Tribunal. The complaint relied on the suspensive effect of Article 27(3)(a) of the Dublin III Regulation.
- 15 On 24 May 2022, Romania informed all Member States that the suspension of inbound transfers under the Dublin III Regulation had been lifted.
- 16 On 2 December 2022, the Refugee Tribunal confirmed the decision of the Immigration Service of 8 April 2022.
- 17 On 2 February 2023, the representative of the person concerned requested that the matter be reopened. In that regard, the representative submitted that the asylum case of the person concerned should be examined on the merits in Denmark, since the time limit laid down in the first part of Article 29(1) of the Dublin III Regulation had been exceeded at the time of the decision of the Immigration Service of 8 April 2022, with the consequence that subsequently Denmark is responsible for examining the case on the merits, in accordance with Article 29(2). In the alternative, the representative submitted that the case should be referred to the Court of Justice of the European Union for a preliminary ruling, since the Court of Justice had not previously given a ruling on the interpretation of Article 29 in a case such as the present case.
- 18 On 13 February 2023, the Refugee Tribunal decided to reopen the case for rehearing before the Tribunal.
- 19 On 19 April 2023, the Refugee Tribunal confirmed the decision of the Immigration Service of 8 April 2022. So far as concerns the issue of the calculation of the time limit under Article 29(1) of the Dublin III Regulation, the decision states, inter alia:

‘ ...

The consequence of the fact that, on 15 March 2022, the Refugee Tribunal remitted the case to the Immigration Service was that the case, as a result of the decision of the appellate body, continued to be dealt with by the immigration authorities, just as the continued handling of the case meant that the complainant could not be transferred to Romania and that the fresh decision of the Immigration Service of 8 April 2022 on transfer to Romania conferred suspensive effect during the appeal procedure until the Refugee Tribunal’s fresh decision of 2 [Or. 5] December 2022, by which the Tribunal confirmed the decision of the Immigration Service that the complainant could be transferred to Romania.

Neither the Dublin III Regulation nor the case-law of the Court of Justice of the European Union cited above expressly states the consequences, as regards the time limit, of a remittal by an appeal body to the first instance body of a decision taken on the basis of the Dublin III Regulation for fresh examination at first instance, but it is apparent from Article 29(1) of that regulation that a transfer is to have been carried out at the latest within six months of acceptance by another Member State of the request to take charge or to 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)(a). Where the transfer does not take place within the six month time limit, the Member State responsible shall, pursuant to [Article 29(2)], be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the person concerned or up to a maximum of eighteen months if the person concerned absconds.

In any event, in the present circumstances, where the remittal arose from wholly unforeseeable circumstances, which are not the fault of the immigration authorities, the Refugee Tribunal finds it most in line with Article 27 of the Dublin III Regulation and the interests underlying that provision on access to effective remedies in respect of decisions made under Article 18(1)(a) and (c) of the Dublin III Regulation (see also in that regard recital 19 in the preamble and Article 47 of the European Charter [of Fundamental Rights]), to interpret the Dublin III Regulation as meaning that, in the present case, the time limit of six months laid down in the second part of Article 29(1) of the Dublin III Regulation in the specific case first began to run only from the Refugee Tribunal’s final decision of 2 December 2022, even though the Refugee Tribunal’s remittal of 15 March 2022 could have resulted in a determination by the Immigration Service that the person concerned should not be transferred to Romania.

The Refugee Tribunal therefore finds no basis on which to hold that the asylum application of the person concerned must now be examined on the merits in Denmark. []

[...]

- 20 On 4 May 2023, the Refugee Tribunal decided, on the basis of a request from the Danish Refugee Council, to reopen the case in order to review the interpretation of the time limit rules in the Article 29(1) and (2), in conjunction with Article 27, of the Dublin III Regulation. The Danish Refugee Council referred, in the request to reopen the case, in particular to the judgment of the Court of Justice of the European Union of 30 March 2023 in the case of *E.N. and Others* (C-556/21[, EU:C:2023:272]) and submitted that responsibility under the regulation had passed to Denmark when the Immigration Service made its decision of 8 April 2022, see Article 29(2) of the Dublin III Regulation.
- 21 **[Or. 6]** The examination of the initial appeal, the examination of the second appeal and the first reopening of the case had suspensive effect as regards the removal, which is also the case in the present reopening of the matter.

EU law

- 22 The relevant EU-law framework is Article 29(1) and (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, p. 31)], in conjunction with Articles 18 and 27 of that regulation and recitals 4, 5 and 19 in the preamble thereto and Article 47 of the Charter of Fundamental Rights of the European Union.
- 23 It follows from Article 29(1) of the Dublin III Regulation, inter alia, that the transfer of the applicant or of another person as referred to in Article 18(1)(c) or (d) of the regulation from the requesting Member State to the Member State responsible is to be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to 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). Where the transfer does not take place within the time limit of six months set out in Article 27(1), it follows from Article 29(2) that the Member State responsible is to be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the person concerned or up to a maximum of eighteen months if the person concerned absconds.

- 24 It follows from Article 27 of the Dublin III Regulation that an alien as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.
- 25 The recitals in the preamble to the Dublin III Regulation (recitals 4, 5 and 19) are based on the existence of a clear and workable method for determining the Member State responsible for the examination of an asylum application. Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned and should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection. Legal safeguards and the right to an effective remedy in respect of [Or. 7] decisions regarding transfers to the Member State responsible should be established, see in particular Article 47 of the Charter of Fundamental Rights of the European Union.
- 26 The Court of Justice of the European Union has ruled in a line of decisions on the interpretation of Article 29(1) and (2) and Article 27 of the Dublin III Regulation, and the Refugee Tribunal is aware that, in the case-law of the Court of Justice, the interpretation of the time limits in the Dublin III Regulation is restrictive, see in that regard – besides the decisions referred to in paragraphs 32 and 33 below – judgment of the Court of Justice of 31 May 2018 in *Adil Hassan* (C-647/16[, EU:C:2018:368]); judgment of 7 June 2016 in *Ghezelbash* (C-63/15[, EU:C:2016:409]); judgment of 25 October 2017 in *Shiri* (C-201/16[, EU:C:2017:805]) and judgment of 5 July 2018 in *X* (C-213/17[, EU:C:2018:538]).
- 27 The Court of Justice of the European Union has most recently given a ruling on the time limit rules in the Dublin III Regulation in a judgment of 30 March 2023 in *E.N and Others* (C-556/21[, EU:C:2023:272]), where the Court of Justice held that Article 29(1) and (2), in conjunction with Article 27(3), of the regulation, is to be interpreted as not precluding national legislation which allows a national court or tribunal hearing an appeal at second instance against a judgment annulling a transfer decision to adopt, on the application of the competent authorities, an interim measure enabling those authorities to refrain from taking a fresh decision pending the outcome of that appeal and having the object or effect of suspending the running of the transfer time limit until that outcome, provided that such a measure may be adopted only where the implementation of the transfer decision has been suspended pursuant to Article 27(3) or (4) of that regulation during the examination of the appeal at first instance. Furthermore, it follows from paragraph 24 of that judgment that it is apparent from Article 29(1) of the Dublin III Regulation, and in particular from the use of the expression ‘final decision’, that the EU legislature envisaged that the transfer time limit would not start to run until the point at which the decision on an appeal against a transfer decision becomes final, after all remedies provided for by the legal order of the Member State concerned have been exhausted, provided that the implementation of the

transfer decision has been suspended pursuant to Article 27(3) or (4) of that regulation.

National law

- 28 Doubts have arisen in the present case as to the interpretation of the time limit rules in Article 29(1) of the Dublin III Regulation, because, in its examination under Article 27 of the regulation, the Refugee Tribunal remitted the case to the Immigration Service for a fresh examination at first instance in accordance with the national rules of administrative law.
- 29 Under Danish administrative law, remittal means that a superior authority rescinds a decision of a lower authority, after which the case is returned to the lower authority for fresh examination. Accordingly, remittal means that the decision of the lower authority is annulled.
- 30 **[Or. 8]** Under Danish administrative law, a remittal can be made, in principle, in three types of cases: (1) if the first instance body had insufficient information concerning the case on which to base its decision; (2) if substantial procedural errors were committed at first instance; or (3) if there is new, material information relevant to the initial decision.
- 31 A remittal thus means that the case continues to be dealt with by the authorities and that it is possible to bring an appeal against the fresh decision made at first instance.

Arguments of the parties

- 32 The Immigration Service has argued that the time limit in Article 29(1) of the Dublin III Regulation has not expired in the present case and has referred in particular to the fact that that provision takes into account that the time limit for transfer should not expire while there is an appeal with suspensive effect in accordance with Article 27(3) of the regulation, since the time limit first starts to run when a final decision on the appeal is delivered, see judgment of the Court of Justice of the European Union of 29 January 2009 in *Petrosian* (C-19/08[, EU:C:2009:41]), paragraph 45, and judgment of the Court of Justice of 26 July 2017 in *A.S.* (C-490/16[, EU:C:2017:585]), paragraphs 58 and 60. Such a final decision did not occur until the decision of the Refugee Tribunal of 2 December 2022.
- 33 The representatives of the person concerned (the court-appointed lawyer and the Danish Refugee Council) submitted that the time limit in Article 29(1) of the Dublin III Regulation had already expired when the fresh decision of the Immigration Service of 8 April 2022 was made after the remittal decision of the Refugee Tribunal of 15 March 2022 which annulled the decision of the Immigration Service of 19 July 2021. When the fresh decision of the Immigration

Service of 8 April 2022 was made, more than six months had elapsed since the receipt of the acceptance by the Romanian authorities and it thus follows directly from Article 29(1) of the Dublin III Regulation that Denmark is responsible for processing the asylum case of the person concerned. A new transfer decision, taken by the body at first instance after a remittal, must therefore be made within six months of the receipt of the acceptance by the Member State responsible. Reference is made in particular to the mandatory nature of the time limits in Article 29(1) and (2) of the regulation and to the judgment of the Court of Justice of the European Union of 13 November 2018 in *X and X* (C-47/17 and C-48/17[, EU:C:2018:900]), paragraph 70; judgment of 19 March 2019 in *Jawo* (C-163/17[, EU:C:2019:218]), paragraphs 59 and 60; judgment of 31 March 2022 in *IA* (C-231/21[, EU:C:2022:237]), paragraphs 54 to 56, and judgment of 22 September 2022 in *M.A. and Others* (C-245/21 and C-248/21[, EU:C:2022:709]), paragraphs 65 to 68. It follows from neither the wording nor the purpose of those provisions that the remittal decision of the Refugee Tribunal of 15 March 2022 constitutes a ‘final’ decision which justifies a new time limit of six months under the regulation. Following the judgment of the Court of Justice of 30 March 2023 in *E.N. and Others* (C-556/21[, EU:C:2023:272]), there are grounds for holding that the remittal decision of 15 March 2022 entails an annulment of the decision of the Immigration Service of 19 July 2021 and that therefore it was no longer a transfer decision which could be [Or. 9] reviewed or the implementation of which postponed under Article 27 of the Dublin III Regulation. Furthermore, it is submitted that the *Petrosian* case (C-19/08) concerns the previous Dublin II Regulation and that the applicable Dublin III Regulation contains an improved protection for asylum seekers in the Dublin procedure, notably in respect of the regulation of the issue of suspensive effect, and that the *A.S.* case (C-490/16[, EU:C:2017:585]) concerns a different situation from that of the present case, since it exclusively deals with a situation of an appeal before a court or tribunal covered by Article 27(3) of the regulation, by virtue of which suspensive effect is granted.

Background to the question referred by the Refugee Tribunal

- 34 The situation in the present case is that the Immigration Service, within the time limit of six months laid down in the first part of Article 29(1) of the Dublin III Regulation, decided to transfer the person concerned to Romania in accordance with Article 18(1)(c) of the Dublin III Regulation. That decision was brought before the Refugee Tribunal in its capacity as appeal body (see Article 27 of the Dublin III Regulation), and, on 15 March 2022, the Refugee Tribunal decided to remit the case to the Immigration Service for fresh consideration at first instance, referring to the fact that the Romanian authorities had, with effect from 1 March 2022, decided to suspend transfers under the regulation to Romania due to the conflict in Ukraine and the increased influx of refugees to Romania. The Immigration Service subsequently, on 8 April 2022, made a fresh decision to transfer the person concerned to Romania in accordance with Article 18(1)(c) of the Dublin III Regulation and that decision, which was therefore adopted after

expiry of the time limit of six months laid down in the first part of Article 29(1) of that regulation which ran from the acceptance by the Member State responsible of the transfer, was brought before the Refugee Tribunal for appeal within the period prescribed under national law. The Refugee Tribunal subsequently made a final decision in the appeal proceedings on 2 December 2022, adopted following the Tribunal's remittal of 15 March 2022 and the Immigration Service's consequent confirmation of the transfer decision of 8 April 2022.

- 35 As an alternative to the remittal of 15 March 2022, the Refugee Tribunal could have stayed the appeal procedure in the Refugee Tribunal so that the Tribunal – possibly through the Immigration Service – could obtain further information on the altered situation in Romania and, in such a situation, the problems in this case would not have arisen. It therefore follows from the first part of Article 29(1) of the Dublin III Regulation that transfer is to be carried out at the latest within six months of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3) of the regulation. However, it is the Tribunal's preliminary view that such approach entails a reduced protection for the person concerned than the approach adopted by the Tribunal, by which the case was remitted to the Immigration Service and it was made possible for the person concerned to have the case re-examined at two instances.
- 36 **[Or. 10]** In the present case, the remittal was based on external and wholly unforeseeable circumstances outside the control of the Immigration Service – namely that the Member State responsible, Romania, after having accepted the transfer, suspended all transfers under the Dublin III Regulation due to the conflict in Ukraine and the increased influx of refugees to the country. The Refugee Tribunal therefore seeks, by request for a preliminary ruling, to clarify how the time limits in Article 29(1) and (2), in conjunction with Article 27, of the Dublin III Regulation are to be calculated in a situation such as that of the present case, which, as the Refugee Tribunal understands it, does not seem expressly regulated in the Dublin III Regulation, including whether the Member States are free – within the national administrative law framework and also in accordance with the EU law principles of equivalence and effectiveness, and with the principle of procedural autonomy ([see] in that regard, judgment of the Court of Justice of the European Union of 15 April 2021 in *H.A.* (C-194/19[, EU:C:2021:270])), paragraph 42) – to calculate the time limit from the final, substantive decision in the case. In the present case, that point in time was the decision of the Refugee Tribunal of 2 December 2022 which confirmed the fresh decision of the Immigration Service of 8 April 2022 to transfer the person concerned.

The question referred

- 37 Against the above background, the Court of Justice of the European Union is requested to reply to the following question:

1. Are the time limit provisions in Article 29(1) and (2) of the Dublin III Regulation to be interpreted as meaning that the time limit of six months laid down in the second part of Article 29(1) of that regulation is to run from the final, substantive decision in the case, in a situation where an appellate body in the requesting Member State, as referred to in Article 27 of the Dublin III Regulation, has remitted the transfer case back to the competent authority at first instance, which subsequently made a fresh transfer decision more than six months after receipt of the acceptance by the Member State responsible, including where the remittal is based on the fact that the Member State responsible, which had initially accepted the transfer, subsequently decided to suspend all transfers under the Dublin III Regulation, and where suspensive effect has been granted as regards the removal of the person concerned?

[...]

[...]

[name]

(President, Judge at the
Court of Appeal)

[...]

[name]

(Member, appointed
by the Bar Council)

[...]

[name]

(Member appointed by the Minister
for Immigration and Integration)