Case C-325/21

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:

K.

Respondent:

Staatssecretaris van Justitie en Veiligheid

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 17 October 2019, whereby it declared unfounded the appeal lodged by K. against the decision of 24 July 2019 of the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security; 'the Staatssecretaris') not to examine an application by K. for a fixed-term residence permit issued to persons granted asylum on the ground that, in its view, Austria is responsible for examining that application, and ruled that the Staatssecretaris was right to hold Austria responsible for examining the application for international protection.

Subject and legal basis of the request

Request under Article 267 TFEU concerning the interpretation of Article 27(1) and 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').

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. In that regard, the referring court observes that, in order to prevent the transfer time limit referred to in Article 29(1) and (2) of the Dublin Regulation from expiring and the responsibility for examining an application for international protection from shifting to another Member State as a result of a foreign national absconding repeatedly, various Member States in practice apply a method of calculating transfer time limits known as the 'chain rule'. This rule, which was devised by the Dublin Contact Committee, [1] provides that the transfer time limit restarts in cases where the foreign national absconds prior to the transfer and lodges a new application for international protection in a third Member State before the end of that period. Since the 'chain rule' does not (yet) have any legal status, but is already being applied in the State practice, the referring court asks whether the Dublin Regulation precludes the application of that rule. In addition, the referring court seeks a ruling from the Court of Justice on the question whether the foreign national may invoke in a third Member State the expiry of the transfer time limit between the requesting and the requested Member States referred to in Article 29(2) of the Dublin Regulation.

Questions referred for a preliminary ruling

1. Must Article 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 meaning that a current transfer time limit, as referred to in Article 29(1) and (2), restarts at the point at which the foreign national, after having obstructed the transfer by a Member State by absconding, lodges a fresh application for international protection in another (in this case, a third) Member State?

2. If Question 1 must be answered in the negative, 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, France and Austria) has expired, with the result that the time limit within which the Netherlands can effect the transfer has expired?

[1] The Dublin Contact Committee is a group of national experts designated by Member States to advise the Commission in the exercise of its powers under the Dublin Regulation and its implementing rules.

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 ('the Implementing Regulation'), 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 6 September 2018, K., who is from Nigeria ('the foreign national'), applied for international protection in France. As the foreign national had previously lodged an application for international protection in Austria, France requested Austria to take him back. Austria accepted this take back request on 4 October 2018. The foreign national having absconded, the transfer between France and Austria did not take place.

2 The foreign national then, on 27 March 2019, lodged an application for international protection in the Netherlands. On 3 May 2019, the Staatssecretaris held Austria responsible for examining this application pursuant to Article 18(1)(b) of the Dublin Regulation. Austria refused the take back request, on 10 May 2019, because France had not informed it that the transfer could not take place within a time limit of six months. According to Austria, by virtue of Article 29(2) of the Dublin Regulation, the responsibility for examining the application therefore transferred to France on 4 April 2019.

3 Then, on 31 May 2019, the Staatssecretaris requested both Austria and France to reconsider the take back request. In his letter to the Austrian authorities, the Staatssecretaris stated that Austria was responsible because the transfer time limit between France and Austria had restarted as the foreign national had lodged an application for international protection in the Netherlands before that time limit had expired.

4 On 3 June 2019, Austria accepted the take back request from the Netherlands. By decision of 24 July 2019, the Staatssecretaris declined to examine the foreign national's application for international protection.

5 The foreign national lodged an appeal against that decision before the Rechtbank Den Haag, which handed down the contested decision on 17 October 2019.

Main arguments of the parties in the main proceedings

6 K. took the view at first instance that, from 4 April 2019, France was the Member State responsible, as France had not informed Austria that the transfer had to be postponed pursuant to the second sentence of Article 29(2) of the Dublin Regulation. Since the Netherlands had not submitted a take charge or take back request to Austria before that date, he could not be transferred to Austria. Since the Staatssecretaris had also not submitted a take charge or take back request to France after that date and within the time limit specified in Article 21(1) or Article 23(2) of the Dublin Regulation, the foreign national contended that the Netherlands had become the Member State responsible.

7 In support of his appeal, the foreign national argues that the ruling of the court of first instance was contrary to Article 29 of the Dublin Regulation, on the ground that, according to him, the transfer time limits in that article are maximum periods and therefore cannot be extended if an application for international protection is lodged in a third Member State. In addition, he disputes the finding of the court of first instance that such an interpretation of that article is contrary to the objective of the Dublin Regulation, since that regulation is intended not only to avoid 'forum shopping' but also to provide the foreign national with clarity, at short notice, as to which Member State is responsible for examining the application for international protection.

Brief summary of the reasons for the referral

8 The referring court notes that it is not disputed in the appeal that the French authorities did not notify Austria, in accordance with Article 9(2) of the Implementing Regulation, that the foreign national had absconded and that, as a result, they were unable to effect the transfer within a period of six months.

9 It follows from the case-law of the Court of Justice that the six-month time limit and the conditions for its extension in Article 29(2) of the Dublin Regulation must be strictly applied. Thus, in paragraph 72 of the judgment of 19 March 2019, *Jawo*, EU:C:2019:218, the Court of Justice held that the second sentence of Article 29(2), of the Dublin Regulation does not require, for the extension of the transfer time limit in the situations referred to therein, any consultation between the requesting Member State and the Member State responsible. Furthermore, the Court of Justice has repeatedly held that the take charge and take back procedures must be carried out in accordance with the rules laid down, inter alia, in Chapter VI of the Dublin Regulation and, in particular, in compliance with a series of specified time limits (see judgments of 26 July 2017, *Mengesteab*, EU:C:2017:587, paragraphs 49 and 50; of 25 January 2018, *Hasan*, EU:C:2018:35, paragraph 60, and of 13 November 2018, *X and X*,

EU:C:2018:900, paragraph 57). In paragraph 70 of the latter judgment, the Court of Justice explains that that set of mandatory time limits testifies to the particular importance that the EU legislature has attached to the rapid determination of the Member State responsible for the examination of an application for international protection. The EU legislature has accepted that such applications are therefore, when necessary, examined by a Member State other than the Member State designated as being responsible pursuant to the criteria laid down in Chapter III of that regulation.

10 In the light of that case-law, it must be assumed, according to the referring court, that a mandatory transfer time limit of six months applies between Austria and France and that exceedance of that time limit will result in a shift of responsibility between those two Member States. The question arises, however, as to the extent to which that time limit is still relevant for the assessment of a fresh application for international protection in a third Member State, since Article 29(2) of the Dublin Regulation appears not to relate directly to the situation of the foreign national who not only absconded, but also lodged on 27 March 2019 – within the transfer time limit between Austria and France – a fresh application for international protection in the Netherlands. The referring court considers the answer to this question relevant for determining whether the Dublin Regulation can be interpreted in conformity with the 'chain rule'.

11 In order to answer that question, the referring court has developed two scenarios: in the first scenario, the time limits laid down in Article 29 of the Dublin Regulation affect only the relationship between the Member State responsible and the requesting Member State – Austria and France – whereas the second scenario starts from the 'chain rule', on the basis of which the original transfer time limit can restart, whereby the relationship between Austria and the third Member States where the foreign national has requested international protection are also regulated.

12 In the first scenario, Article 29 of the Dublin Regulation is interpreted as meaning that the transfer time limit laid down therein applies in any event between the two Member States that concluded the claim agreement which underpins the transfer decision (see the *Jawo* judgment, paragraph 59, which refers to the 'two Member States concerned'). The fact that, following the conclusion of that agreement, the same foreign national lodges a fresh application for international protection in a third Member State does not affect the duration of that transfer time limit.

13 That interpretation would mean in this case that the transfer time limit between Austria and France expired after six months. As a result, Austria would have been relieved of its obligation to take back the foreign national on 4 April 2019 and responsibility would have shifted to France.

14 Leaving aside the question of whether the foreign national can successfully argue that Austria accepted the Staatssecretaris's take back request on incorrect grounds (see, in that regard, judgment of 2 April 2019, *H.R.*, EU:C:2019:280, paragraph 80

and the second question referred for a preliminary ruling), the referring court considers that the reasoning in this first scenario leads to the conclusion that responsibility for examining the application for international protection has shifted to the Netherlands. In addition to the transfer time limits laid down in Article 29 of the Dublin Regulation, the periods for making a take charge or take back request laid down in the third subparagraph of Article 21(1) and in Article 23(3) of the Dublin Regulation, must also be taken into account. As those periods have expired, the Staatssecretaris would not be able to submit a new take charge or take back request to France in this case.

15 An argument in favour of the interpretation set out in the first scenario is that it is consistent with the objective of the Dublin Regulation to determine rapidly, in accordance with a clear and workable method, the Member State responsible for the examination of an application for international protection. That is important in order to guarantee effective access to the procedures for granting international protection and to ensure the rapid processing of such applications, as is clear from recitals 4 and 5 of the Dublin Regulation and from paragraphs 58 and 59 of the *Jawo* judgment. If the requesting Member State is unable to transfer the foreign national to the Member State responsible within the time limit of six to eighteen months, responsibility automatically transfers to that requesting Member State.

16 An argument against that interpretation is that it encourages ‘forum shopping’ and secondary migration movements. It is apparent from the present case that, by absconding and travelling, the foreign national may to a considerable extent himself determine which Member State becomes responsible for examining his application for international protection. If the foreign national absconds for long enough, the requesting Member State cannot transfer him to the Member State responsible within the transfer time limit and, pursuant to Article 29(2) of the Dublin Regulation, the latter Member State is relieved of its obligation to take back the foreign national. Furthermore, a third Member State in which the foreign national reappears and lodges a fresh application for international protection will often have to make more than one attempt to conclude a take back or take charge agreement. This runs counter to the objectives of the Dublin Regulation of rapid processing of applications for international protection and the avoidance of ‘forum shopping’ (see recital 5 of the Dublin Regulation and judgment of 7 June 2016, *Ghezelbash*, EU:C:2016:409, paragraph 54).

17 In that regard, the referring court notes that its finding that under the current Dublin Regulation there is a trend towards ‘forum shopping’, is shared by the Commission. This is apparent, first, from recital 25 of the Commission’s proposal for a recast Dublin Regulation (COM(2016) 270 final), which seems to indicate that the interpretation given to Article 29 of the current Dublin Regulation in the first scenario outlined above is the correct one, while at the same time indicating that the result is undesirable in this case and, second, from Article 35(2) of the new Commission proposal for a regulation on asylum and migration management (COM(2020) 610 final). According to that provision, a current transfer time limit is interrupted if a foreign national absconds and the transferring Member State

notifies the Member State responsible. If the foreign national subsequently reappears in that Member State, the transfer time limit restarts and the person can still be transferred within the remaining time. According to the referring court, this is a completely different method of avoiding 'forum shopping' from the 'chain rule'.

18 The referring court points out in the second scenario that the Staatssecretaris's interpretation of the 'chain rule' in this case means that the original transfer time limit between France and Austria was six months and expired on 27 March 2019. Because the foreign national absconded and then lodged a fresh application for international protection in the Netherlands on 27 March 2019 – before the expiry of that time limit – that time limit restarted by virtue of the 'chain rule'. As a result, on 27 March 2019, the time limit within which the transfer to Austria could take place was de facto extended by six months to 27 September 2019. According to that reasoning, Austria would be the Member State responsible for processing the foreign national's application.

19 According to the referring court, while the application of that rule may disincentivise absconding and secondary migration movements, in so far as it becomes unattractive for foreign nationals to abscond and travel in order to cause the responsibility for examining an application for international protection to shift to another Member State, it notes that, under the current Dublin Regulation, that rule does not have legally binding status, since the minutes of the Dublin Contact Committee merely reflect informal discussions which are not binding on the Member States and the Commission. The lack of legally binding status of the 'chain rule' leads to divergent views on its applicability among Member States, whereby situations could arise in which more Member States consider themselves responsible or, conversely, where not a single Member State considers itself responsible, which is contrary to the Dublin Regulation's objective of the rapid processing of applications for international protection.

20 If it were to be assumed that the Dublin Regulation leaves no scope for the 'chain rule' and given that the transfer time limit between Austria and France expired after six 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 24 July 2019, the expiry of that transfer time limit, with the result that the time limit within which the Netherlands can make the transfer has expired.

21 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.

22 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 Austria and France 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

23 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.

24 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.

25 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.