Case C-185/24 [Tudmur] [i]

Request for a preliminary ruling

Date lodged:

7 March 2024

Referring court:

Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Germany)

Date of the decision to refer:

14 February 2024

Applicant:

RL

Defendant:

Bundesrepublik Deutschland

[…]

O r d e r

In the administrative-law case

of RL

applicant,

[…]

v

the Federal Republic of Germany […],

defendant,

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

concerning asylum law (Syria) – Decision as to inadmissibility under Paragraph 29(1), point 1(a), of the Asylgesetz (Law on Asylum; 'the AsylG') and order for removal to Italy,

the 11th Chamber of the

OBERVERWALTUNGSGERICHT FÜR DAS LAND NORDRHEIN-WESTFALEN

(HIGHER ADMINISTRATIVE COURT FOR THE *LAND* OF NORTH RHINE-WESTPHALIA, GERMANY),

on 14 February 2024,

[…]

made the following order:

The proceedings are stayed.

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

1. Is the second subparagraph of Article 3(2) of Regulation (EU) No 604/2013 to be interpreted as meaning that there are systemic flaws in the asylum procedure and the reception conditions for applicants in the Member State primarily designated as responsible, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, where that Member State refuses in principle to (take back or) take charge of asylum seekers, for an indefinite period of time, on account of a State-ordered suspension of the acceptance of transfers?

2. If Question 1 is to be answered in the negative, is the second subparagraph of Article 3(2) of Regulation (EU) No 604/2013 to be interpreted as meaning that the rules of EU law on the determination of the facts, which require the establishment of objective, reliable, specific and properly updated information on the asylum procedure and the reception conditions for applicants to be transferred, are restricted where the adjudicating court cannot obtain that information and would be able to determine only a hypothetical set of facts because the Member State in question refuses in principle to (take back or) take charge of asylum seekers, for an indefinite period of time, on account of a State-ordered suspension of the acceptance of transfers?

G r o u n d s:

I.

The applicant, born in 1996, is a Syrian national. By his own account, he entered the Federal Republic of Germany in mid-December 2021 and applied for asylum on 30 December 2021. A search for the applicant on Eurodac generated a category 2 hit in relation to Italy. According to that hit, his fingerprints had been taken in Trieste on 5 December 2021. Italy did not respond to the take-charge request made by the Bundesamt für Migration und Flüchtlinge ([German] Federal Office for Migration and Refugees) ('the Federal Office') on 6 January 2022.

By decision of 31 March 2022, the Federal Office rejected the applicant's application for asylum as inadmissible (point 1), found that no bars to removal within the meaning of Paragraph 60(5) and (7), first sentence, of the Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Law on the residence, gainful employment and integration of foreign nationals in Federal territory; 'the AufenthG') were present (point 2), and ordered his removal to Italy (point 3). It imposed an entry and residence ban, as provided for in Paragraph 11(1) of the AufenthG, of 15 months from the date of his removal (point 4).

In response to the application for interim relief and the action brought against the abovementioned decision, the Verwaltungsgericht Düsseldorf (Administrative Court, Düsseldorf), by order of 25 April 2022, held that that action was to have suspensive effect and, by judgment of 11 May 2022, annulled the decision of 31 March 2022. On application by the defendant, the referring Chamber, by order of 27 July 2022, granted leave for an appeal to be brought against that judgment.

During the ongoing appeal proceedings, the Italian Dublin Unit, on 5 December 2022, issued to all Dublin Units a circular stating:

> 'This is to inform you that due to suddenly appeared technical reasons related to unavailability of reception facilities Member States are requested to temporarily suspend transfers to Italy from tomorrow, with the exception of cases of family reunification of unaccompanied minors.
>
> Further and more detailed information regarding the duration of the suspension will follow'.

By a further circular of 7 December 2022, the Italian Dublin Unit stated:

> 'I write following the previous communication on 5th December, concerning the suspension of transfers, with the exception of cases of family reunification of minors, due to the unavailability of reception facilities.
>
> At this regard, considering the high number of arrivals both at sea and land borders, this is to inform you about the need for a re-scheduling of

the reception activities for third countries nationals, also taking into account the lack of available reception places'.

So far, no further statement has been released by the Italian Dublin Unit.

By order of 21 June 2023, the referring Chamber dismissed the defendant's appeal, on the following grounds. The Federal Office's decision as to the inadmissibility [of the applicant's application for asylum] is unlawful because the Federal Republic of Germany was responsible for the applicant's asylum procedure, in accordance with the second subparagraph of Article 3(2) of Regulation (EU) No 604/2013. It is impossible to effect a transfer pursuant to that subparagraph to the Member State designated in accordance with the criteria set out in Chapter III. Italy's responsibility under Article 13(1) of Regulation (EU) No 604/2013 ceased to apply, in accordance with the second subparagraph of Article 3(2) of Regulation (EU) No 604/2013, because the Italian authorities are refusing to grant access to the asylum procedure to, and to take charge of, any returnees due to be transferred to Italy in accordance with that regulation ('Dublin returnees').

The Bundesverwaltungsgericht (Federal Administrative Court) set aside the order of this Chamber of 21 June 2023 and referred the case back to the referring court for re-hearing and re-adjudication.

In a statement of 8 February 2024, the Federal Office reported that, in 2023, 11 transfers had been made from Germany to the Member State Italy under the Dublin procedure. According to the Federal Government's answer of 28 February 2023 to a summary question raised by a member of the German Parliament on 17 January 2023 (Bundestag, publication 20/5868), Germany made 14 439 take-charge requests to Italy in 2022, and 8 932 persons for whose asylum procedure Italy was responsible were present in the Federal Republic of Germany as at 31 December 2022. 362 persons were transferred from Germany to Italy in 2022.

II.

[…] [National procedural law]

1 The position under national law is as follows:

The legal assessment of the Federal Office's contested decision is governed under national law by the AsylG, in the version published on 2 September 2008 (BGBl. I, p. 1798), as last amended by Article 1 of the Law of 19 December 2023 (BGBl. 2023 I No 382).

The relevant provisions read:

Paragraph 1 of the AsylG (Scope)

(1) This Law shall apply to foreign nationals applying for:

[…]

2. international protection under Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 […]; international protection within the meaning of Directive 2011/95/EU includes protection against persecution under the Convention of 28 July 1951 on the legal status of refugees (BGBl. 1953 II, p. 559, 560) and subsidiary protection within the meaning of that directive; […]

Paragraph 13 of the AsylG (Application for asylum)

(2) Every application for asylum shall constitute an application for recognition as a person entitled to asylum and to international protection within the meaning of subparagraph 1, point 2. The foreign national may limit the application for asylum to the recognition of international protection. […]

Paragraph 29 of the AsylG (Inadmissible applications)

(1) An application for asylum shall be inadmissible if

1. another State is responsible for conducting the asylum procedure

a) in accordance with Regulation (EU) No 604/2013 […].

2 The questions referred for a preliminary ruling on the interpretation of the second subparagraph of Article 3(2) of Regulation (EU) No 604/2013 are relevant to the judgment to be given in the present proceedings.

a) The conditions laid down in Paragraph 29(1)(1)(a) of the AsylG are met if another State is responsible for conducting the asylum procedure in accordance with Regulation (EU) No 604/2013. In accordance with Article 13(1) and Article 22(7) of Regulation (EU) No 604/2013, the Member State Italy is responsible for conducting the applicant's asylum procedure, unless responsibility has passed to the Federal Republic of Germany pursuant to the second and third subparagraphs of Article 3(2) of Regulation (EU) No 604/2013.

The European Court of Justice has defined the legal limits attaching to transfers under Regulation (EU) No 604/2013 as meaning that systemic flaws, within the meaning of the second subparagraph of Article 3(2) of Regulation (EU) No 604/2013, in the Member State responsible fall within the scope of Article 4 of the Charter and Article 3 ECHR 'only if' they attain a particularly high level of severity, which depends on all the circumstances of the case and is attained if the indifference of the authorities of a Member State results in a person wholly dependent on State support finding him or herself, irrespective of his or her wishes and personal choices, in a situation of extreme material poverty that does not allow that person to meet his or her most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines that person's physical or mental health or puts him or her in a state of degradation incompatible with

human dignity. That threshold cannot therefore cover situations characterised even by a high degree of insecurity or a significant degradation of the living conditions of the persons concerned, where they do not entail extreme material poverty placing that person in a situation of such gravity that it may be equated with inhuman or degrading treatment.

> ECJ, judgments of 19 March 2019 – C-297/17 and others [ECLI:EU:C:2019:219], *Ibrahim* –, paragraphs 89 to 91, and – C-163/17 [ECLI:EU:C:2019:218], *Jawo* –, paragraph 93; order of 13 November 2019 – C-540/17 and others [ECLI:EU:C:2019:964], *Omar and Others* –, paragraph 39.

In the assessment of the referring Chamber, Italy is not prepared to (take back or) take charge of the applicant or of other Dublin returnees, with the exception of a few insignificant individual cases, for an indefinite period of time. On the one hand, this is apparent in the fact that there were only 11 transfers to Italy in 2023, even though, according to the statistics for 2022, the number of asylum seekers for whose asylum procedure Italy is responsible is much higher than the number of transfers actually carried out. The 11 transfers may have been returns of unaccompanied minors carried out for family reunification purposes, which, according to the communication of 5 December 2022, were to be allowed to proceed. On the other hand, the abovementioned circulars from the Italian Dublin Unit do not refer either to an end date or even to an approximate or expected timeframe for the suspension of transfers. Notwithstanding the announcement to this effect in the circular of 5 December 2022, there has been no further information on the duration of the suspension of transfers for more than 14 months. The defendant has likewise not provided this Chamber with any new information either in these or in any other proceedings.

Whether the order of a Member State refusing with immediate effect and for an unspecified and unlimited period of time to accept any further transfers itself leads to systemic flaws within the meaning of the second subparagraph of Article 3(2) of Regulation (EU) No 604/2013 is unclear. The Court of Justice has not yet ruled on that question.

This Chamber takes the view that the take-charge freeze imposed by the circulars issued by the Italian Dublin Unit on 5 and 7 December 2022 leads to systemic flaws within the meaning of the second subparagraph of Article 3(2) of Regulation (EU) No 604/2013. It is clear from the circulars and the corresponding practice of the Italian Dublin Unit that Italy deliberately does not subject its conduct to the regulatory framework of Regulation (EU) No 604/2013 and is already refusing to grant applicants access to the asylum procedure and to take charge of them in the event of their transfer.

> See OVG NRW (Higher Administrative Court, North Rhine-Westphalia), order of 5 July 2023 – 11 A 1722/22.A –, juris, paragraph 46 et seq., with further references; […] [further but

allegedly less clear case-law]; for a different view, see […] [decisions of certain administrative courts] Hess. VGH (Administrative Court, Hessen), order of 27 July 2023 – 2 A 377/23.Z.A –, juris, p. 5.

The reason for the effective non-existence of transfers to Italy is, thus, not the presence of obstacles to transfer, whether actual or under national law, or of any practical impossibility of implementing a transfer decision that would be such as to rule out the assumption of systemic flaws.

See in this regard Court of Justice, judgment of 12 January 2023 – C-323/21 and others [ECLI:EU:C:2023:4] –, paragraph 69 et seq..

What is more, up until Italy's now manifested refusal to take charge [of asylum seekers], this Chamber had proceeded on the assumption that there are in principle no systemic flaws in the Italian asylum procedure and in the conditions for reception obtaining where the applicant – as here – has not yet applied for asylum in Italy.

See in this regard OVG NRW (Higher Administrative Court, North Rhine-Westphalia), order of 26 July 2022 – 11 A 1497/21.A –, juris, paragraph 64 et seq..

According to the case-law of the Federal Administrative Court, the conditions laid down in the second subparagraph of Article 3(2) of Regulation (EU) No 604/2013, which are based (exclusively) on the situation in the Member State responsible, are not automatically met if that Member State refuses to take charge of the persons concerned from the outset. Unwillingness to take charge of [asylum seekers] is not in itself sufficient to support the conclusion that systemic flaws within the meaning of the second subparagraph of Article 3(2) of Regulation (EU) No 604/2013 are present. Italy's statement is such as to constitute an indication only. What is required, however, is a further explanation of the living conditions that would await the asylum seeker in the event of an – assumed – transfer to Italy.

See BVerwG (Federal Administrative Court), order of 8 November 2023 – 1 B 29.23 –, juris, paragraphs 10 and 15.

As regards the take-charge freeze imposed by Italy, the Bundesverfassungsgericht (Federal Constitutional Court), on the other hand, held, in an order refusing to admit a constitutional complaint for adjudication, that the administrative court had failed to fulfil its obligation to determine the facts of the case, inasmuch as it had not adequately addressed the complainant's references to the systemic flaws in the Italian asylum system and, above all, had neglected, as part of its *ex officio* investigation of the case, to familiarise itself with the current reception situation in Italy and to take into account the communications concerning the take-charge freeze.

> See Federal Constitutional Court, decision not to admit for adjudication of 2 August 2023 – 2 BvR 593/23 –, juris, paragraph 12.

b) Question 2 is raised in the event that that Question 1 is answered in the negative.

Before finding a risk within the meaning of Article 4 of the Charter and Article 3 ECHR to be present, the court is obliged to assess, on the basis of information that is objective, reliable, specific and properly updated, and having regard to the standard of protection of fundamental rights guaranteed by EU law, whether there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, in the asylum procedure and in the conditions for the reception [of asylum seekers] which amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment, within the meaning of that provision.

> See Court of Justice, judgment of 19 March 2019 – C-163/17 [ECLI:EU:C:2019:218], *Jawo* –, paragraphs 85 and 90 et seq.; order of 13 November 2019 – C-540/17 and others [ECLI:EU:C:2019:964], *Hamed and Others* –, paragraph 38 et seq., with further references.

Objective, reliable, specific and properly updated information on the asylum procedure and the reception conditions for returning asylum seekers is unobtainable, however, if the Member State in question – such as Italy in this instance – refuses to (take back or) take charge of asylum seekers. How asylum seekers who are to be returned to Italy would fare at present is impossible to determine. Any such determination would necessarily be hypothetical. It would call for speculation that would differ from objective, reliable and specific information.

c) The questions [referred] are also relevant to the judgment to be given because the action for the annulment of the declaration of inadmissibility made by the Federal Office in its decision of 31 March 2022 may be upheld only if the referring court's view is to be endorsed. Otherwise, that action would to this extent have to be dismissed under national law. There are no other grounds on which responsibility lies with the Federal Republic of Germany. In particular, the court proceeds on the assumption that there are no systemic flaws on any other grounds in Italy.

> See in this regard OVG NRW (Higher Administrative Court, North Rhine-Westphalia), order of 26 July 2022 – 11 A 1497/21.A –, juris, paragraph 64 et seq., concerning Dublin returnees who – like the applicant – have not yet applied for asylum in Italy.

3 This Chamber requests that the present reference be dealt with under the expedited procedure, in accordance with Article 105 of the Rules of Procedure of the Court of Justice. Given the large number of refugees present in Germany who have applied for asylum in Germany even though the examination of that application is

itself the responsibility of another Member State, pursuant to Regulation (EU) No 604/2013, a rapid clarification is required.

The referring court notes that the Court of Justice has also been requested to give a preliminary ruling in case 11 A 1080/22.A.

This order is not open to appeal (Paragraph 80 of the AsylG).

[…]