

JUDGMENT OF THE COURT (Grand Chamber)

14 November 2013 (*)

(Asylum – Charter of Fundamental Rights of the European Union – Article 4 – Regulation (EC) No 343/2003 – Article 3(1) and (2) – Determination of the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national – Articles 6 to 12 – Criteria for determining the Member State responsible – Article 13 – Fall-back clause)

In Case C-4/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hessischer Verwaltungsgerichtshof (Germany), made by decision of 22 December 2010, received at the Court on 5 January 2011, in the proceedings

Bundesrepublik Deutschland

v

Kaveh Puid,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen (Rapporteur) and M. Safjan, Presidents of Chambers, J. Malenovský, E. Levits, A. Ó Caoimh, J.-C. Bonichot, D. Šváby, M. Berger and A. Prechal, Judges,

Advocate General: N. Jääskinen,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 22 January 2013,

after considering the observations submitted on behalf of:

- the German Government, by N. Graf Vitzthum, acting as Agent,
- Mr Puid, by U. Schlung-Muntau, Rechtsanwältin,
- the Belgian Government, by T. Materne, acting as Agent,
- Ireland, by D. O’Hagan, acting as Agent, and by D. Conlan Smyth, Barrister,
- the Greek Government, by A. Samoni-Rantou, M. Michelogiannaki, T. Papadopoulou, F. Dedousi and G. Papagianni, acting as Agents,
- the French Government, by G. de Bergues and B. Beaupère-Manokha, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by L. D’Ascia, avvocato dello Stato,
- the Polish Government, by M. Szpunar, acting as Agent,

- the United Kingdom Government, by C. Murrell, acting as Agent,
 - the Swiss Government, by O. Kjelsen, acting as Agent,
 - the European Commission, by M. Condou-Durande and W. Bogensberger, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 18 April 2013,
- gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(2) of Council Regulation (EC) No 343/2003 of 18 February 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 (OJ 2003 L 50, p. 1, ‘the Regulation’).

2 The request has been made in proceedings between the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Bundesamt für Migration und Flüchtlinge (German Federal Office for Migration and Refugees, ‘the Bundesamt’), and Mr Puid, an Iranian national, concerning the decision taken by the Bundesamt declaring his application for asylum inadmissible and ordering his transfer to Greece.

Legal context

3 Article 3(1) and (2) of the Regulation states:

‘1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. ...’.

4 Article 5(1) of the Regulation is worded as follows:

‘The criteria for determining the Member State responsible shall be applied in the order in which they are set out in [Chapter III].’

5 For the purposes of determining the ‘Member State responsible’ as referred to in Article 3(1) of the Regulation, Chapter III of the Regulation sets out a list of objective criteria in hierarchical order.

6 Article 6 of the Regulation specifies the Member State responsible for examining an application for asylum lodged by an unaccompanied minor.

7 Articles 7 and 8 of the Regulation apply to asylum seekers of whom a family member has been allowed to reside as a refugee in a Member State or has lodged an application for asylum which has not been the subject of a first decision regarding the substance in that Member State.

8 Article 9 of the Regulation concerns asylum seekers who have a valid or expired residence document or visa.

9 The following criterion is set out in Article 10(1) of the Regulation:

‘Where it is established ... that an asylum seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for asylum. ...’.

10 The criterion set out in Article 11 of the Regulation may be applicable, under certain conditions, where an asylum seeker has entered the territory of a Member State in which the need for him to have a visa is waived.

11 Article 12 refers to applications for asylum made in the international transit area of an airport of a Member State.

12 Article 13 of the Regulation provides that, where no Member State can be designated according to the hierarchy of criteria, the default rule is that it is the first Member State with which an application for asylum was lodged that is to be responsible for examining it.

The dispute in the main proceedings and the question referred for a preliminary ruling

13 Mr Puid, who was born in 1979, arrived in Greece with false identity papers on 20 October 2007 on a flight from Tehran (Iran) to Athens (Greece). After staying in Greece for four days, he travelled on to Frankfurt am Main (Germany) where he lodged his application for asylum.

14 Mr Puid was then ordered to be detained until 25 January 2008 in order to ensure that he might be removed. He then applied to the Verwaltungsgericht Frankfurt am Main (Administrative Court, Frankfurt am Main) for interim measures, seeking, inter alia, an order that the Bundesrepublik Deutschland assume responsibility for examining his application for asylum under Article 3(2) of the Regulation. That court ordered that Mr Puid not be transferred to Greece before 16 January 2008.

15 On 14 December 2007, the Bundesamt declared his application for asylum inadmissible and ordered his transfer to Greece. The Bundesamt took the view that the Hellenic Republic was the Member State responsible for examining the application and could see no reason for the Bundesrepublik Deutschland to apply Article 3(2) of the Regulation. On 23 January 2008, Mr Puid was transferred to Greece.

16 However, in the meantime, on 25 December 2007, Mr Puid had brought an action before the Verwaltungsgericht Frankfurt am Main seeking the annulment of the Bundesamt’s decision and an order that the Bundesrepublik Deutschland assume responsibility in respect of his application for asylum.

17 By judgment of 8 July 2009, the Verwaltungsgericht Frankfurt am Main annulled the decision of the Bundesamt and concluded that the enforcement of the order for Mr Puid’s return had been unlawful. That decision was based on the fact that the Bundesrepublik Deutschland was required to exercise the right to assume responsibility conferred by Article 3(2) of the Regulation in light of, inter alia, the conditions in Greece in relation to the reception of asylum seekers and processing of asylum applications.

18 The Bundesrepublik Deutschland, represented by the Bundesamt, brought an appeal against that

judgment before the Hessischer Verwaltungsgerichtshof (Higher Administrative Court, Hesse).

- 19 In those circumstances, the Hessischer Verwaltungsgerichtshof, by decision of 22 December 2010, decided to stay the proceedings and to refer four questions to the Court for a preliminary ruling, seeking to ascertain the scope of Article 3(2) of the Regulation where the situation prevailing in the Member State, which the criteria set out in Chapter III of the Regulation indicate is responsible for examining an asylum application, poses a threat to the fundamental rights of the asylum seeker in question.
- 20 On 20 January 2011, the Bundesamt decided to examine Mr Puid's application for asylum under Article 3(2) of the Regulation. The Bundesamt subsequently recognised him as having refugee status by decision of 18 May 2011.
- 21 The Hessischer Verwaltungsgerichtshof considers nevertheless that its request for a preliminary ruling is still relevant in so far as Mr Puid can show a legitimate interest in having the unlawfulness of the decision of 14 December 2007 established in order to have a claim for compensation in respect of his detention examined.
- 22 By letter of 21 December 2011, the Registrar of the Court sent the referring court the judgment of 21 December 2011 in Joined Cases C-411/10 and C-493/10 *N. S. and Others* [2011] ECR I-0000, requesting that court to inform the Court whether, in the light of that judgment, it wished to maintain the reference for a preliminary ruling.
- 23 By decision of 1 June 2012, received at the Court on 8 June 2012, the Hessischer Verwaltungsgerichtshof withdrew the first three questions, considering that they had been adequately addressed in the judgment in *N. S. and Others*. None the less, in order to clarify the effect of that judgment as regards the possibility of an asylum applicant relying in legal proceedings on the duty of the Member State in which he is located to examine his application for asylum, the referring court considers that the following question should be maintained:

‘Does an enforceable personal right on the part of the asylum seeker to force a Member State to assume responsibility result from the duty of the Member States to exercise their right under the first sentence of Article 3(2) of [the] Regulation?’

The question referred for a preliminary ruling

- 24 By its question, the referring court asks, in essence, whether an asylum seeker can rely, before a national court, on the duty of the Member State with which he lodged an application for asylum to examine that application under Article 3(2) of the Regulation, when the situation prevailing in the Member State, which the criteria set out in Chapter III of the Regulation indicate is responsible for examining the application, poses a threat to the fundamental rights of the asylum seeker.
- 25 It must be stated at the outset that it is apparent from the decisions delivered on 22 December 2010 and 1 June 2012 by the referring court that that question is based on the premiss that, in a situation such as that at issue in the main proceedings, the Member State with which the asylum seeker lodged his application would be obliged to exercise the right to assume responsibility conferred by Article 3(2) of the Regulation.
- 26 No such premiss can be derived from that provision.
- 27 Under Article 3(1) of the Regulation, an application for asylum is to be examined by a single Member State, which is to be the one which the criteria set out in Chapter III of the Regulation

indicate is responsible.

- 28 That being said, Article 3(2) of the Regulation provides that, by way of derogation from Article 3(1), each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility according to the criteria laid down in the Regulation.
- 29 While the Court pointed out, in paragraph 107 of the judgment in *N. S. and Others*, that, in a situation such as that at issue in that case, the Member State which is determining the Member State responsible has the right referred to in Article 3(2) to itself examine the application, the Court none the less did not state that the Member State was required to do so.
- 30 By contrast, it must be borne in mind that the Court has held that the Member States may not transfer an asylum seeker to the Member State which the criteria set out in Chapter III of the Regulation indicate is responsible, where they cannot be unaware that systemic deficiencies in the asylum procedure and in the conditions for the reception of asylum seekers in that Member State provide 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 Article 4 of the Charter of Fundamental Rights of the European Union (see, to that effect, *N. S. and Others*, paragraphs 94 and 106).
- 31 It is for the referring court to examine whether such systemic deficiencies existed on the date on which the decision to transfer Mr Puid to Greece was enforced.
- 32 With regard to the question whether the Member State which cannot carry out the transfer of the asylum seeker to the Member State initially identified as responsible in accordance with the Regulation is obliged itself to examine the application, it should be recalled that Chapter III of the Regulation sets out a number of criteria and that, in accordance with Article 5(1) of the Regulation, those criteria apply in the order in which they are set out in that chapter (*N. S. and Others*, paragraph 95).
- 33 Therefore, as the Court has already held, subject to the right itself to examine the application referred to in Article 3(2) of the Regulation, the finding that it is impossible to transfer an applicant to the Member State initially identified as responsible in accordance with the criteria set out in Chapter III of the Regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of those criteria enables another Member State to be identified as responsible for the examination of the asylum application (*N. S. and Others*, paragraphs 96 and 107).
- 34 If they do not, the first Member State with which the application was lodged is to be responsible for examining it in accordance with Article 13 of the Regulation (see, to that effect, *N. S. and Others*, paragraph 97).
- 35 The Member State in which the asylum seeker is located must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of the Regulation (*N. S. and Others*, paragraphs 98 and 108).
- 36 In light of the foregoing, the answer to the question referred is that where the Member States cannot be unaware that systemic deficiencies in the asylum procedure and in the conditions for the reception of asylum seekers in the Member State initially identified as responsible in accordance

with the criteria set out in Chapter III of the Regulation provide substantial grounds for believing that the asylum seeker concerned would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, which is a matter for the referring court to verify, the Member State which is determining the Member State responsible is required not to transfer the asylum seeker to the Member State initially identified as responsible and, subject to the exercise of the right itself to examine the application, to continue to examine the criteria set out in that chapter, in order to establish whether another Member State can be identified as responsible in accordance with one of those criteria or, if it cannot, under Article 13 of the Regulation.

- 37 Conversely, in such a situation, a finding that it is impossible to transfer an asylum seeker to the Member State initially identified as responsible does not in itself mean that the Member State which is determining the Member State responsible is required itself, under Article 3(2) of the Regulation, to examine the application for asylum.

Costs

- 38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Where the Member States cannot be unaware that systemic deficiencies in the asylum procedure and in the conditions for the reception of asylum seekers in the Member State initially identified as responsible in accordance with the criteria set out in Chapter III of Council Regulation (EC) No 343/2003 of 18 February 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 provide substantial grounds for believing that the asylum seeker concerned would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, which is a matter for the referring court to verify, the Member State which is determining the Member State responsible is required not to transfer the asylum seeker to the Member State initially identified as responsible and, subject to the exercise of the right itself to examine the application, to continue to examine the criteria set out in that chapter, in order to establish whether another Member State can be identified as responsible in accordance with one of those criteria or, if it cannot, under Article 13 of the Regulation.

Conversely, in such a situation, a finding that it is impossible to transfer an asylum seeker to the Member State initially identified as responsible does not in itself mean that the Member State which is determining the Member State responsible is required itself, under Article 3(2) of Regulation No 343/2003, to examine the application for asylum.

[Signatures]

* Language of the case: German.