

Provisional text

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 8 June 2017([1](#))

Case C-490/16

A.S.
v
Republic of Slovenia

(Request for a preliminary ruling from the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia))

and

Case C-646/16

Jafari

(Request for a preliminary ruling from the Verwaltungsgerichtshof Wien (Supreme Administrative Court, Vienna) (Austria))

(Area of freedom, security and justice – Borders, asylum and immigration – Determination of the Member State responsible for examining a third-country national’s application for asylum – Criteria for determining the Member State responsible for examining applications for international protection – Interpretation of Articles 12, 13 and 14 of Regulation (EU) No 604/2013 – Interpretation of Article 5(4)(c) of Regulation (EC) No 562/2006)

Introduction

1. If one looks at a map of Europe and superimposes upon it a map of the European Union, carefully marking in the EU's external frontiers, certain obvious truths emerge. There is an extended land frontier to the east bordering nine EU Member States. (2) As one moves into the Balkans the geography – like the history – becomes a little complicated. (3) The essential point to stress is that a 'land bridge' leads directly from Turkey into the European Union. To the south of the territory of the European Union lies the Mediterranean – crossable by improvised craft if the conditions in one's homeland are sufficiently appalling to lead one to attempt that desperate venture. The closest crossing points lead to landfalls in Greece, Malta or Italy – or, at the extreme western end, in Spain. The eastern and south-eastern borders of the European Union are therefore potentially open to overland migration; (4) whilst the southern border is potentially open to migration across the Mediterranean.

2. The western edge of the European Union is significantly less open to migration. There is, first, the Atlantic seaboard along the entire western edge of the EU's territory. Then, to the north, there is more sea – the Irish Sea, the Channel and the North Sea; (5) the Skagerrak, (6) the Kattegat and the Baltic Sea. (7) As well as the Baltic Sea on its southern border, Sweden has a land border to the north with its neighbour, Norway. Finland has both sea frontiers (8) and land frontiers. (9) To the west and north, therefore, geography and climate combine to render migration significantly more difficult.

3. The 'Dublin system' (10) does not take the map of Europe that I have just described as its starting point. Rather, it tacitly assumes that all applicants for international protection will arrive by air. Were they to do so, there would in theory be something closer to an equal chance that (very roughly) equal numbers of applicants would arrive in each of the 28 Member States. (11) Against that background, the system put in place makes very reasonable sense.

4. Another essential element of the Dublin system is that it focuses on the individual applicant for international protection. It is that individual applicant (as defined in Article 2(c) of the Dublin III Regulation) who is assessed by reference to the criteria set out in its Chapter III in order to determine which Member State is responsible for considering his application for international protection. The whole regulation is cast in terms of the individual. That is self-evidently right and proper. Individual human beings seeking protection are not statistics; they are to be treated humanely and with respect for their fundamental rights. In normal times, giving effect to the approach enshrined in the Dublin III Regulation may require administrative coordination and cooperation between the competent authorities of different Member States, but it presents no intrinsic or insurmountable difficulties.

5. Between September 2015 and March 2016, the times were anything but normal.

6. This is how the Vice-President of the European Commission described the root cause of the sudden, overwhelming migration towards the European Union:

'There is a hell on earth. It is called Syria. The fact that millions of people try to flee from that hell is understandable. The fact that they try to stay as close to their home as possible is also understandable. And it is self-evident that they try to find safe shelter somewhere else if that does not work. ... More and more people are fleeing. The situation in neighbouring countries offers little or sometimes no hope. So people look for a safe haven [via Turkey which shelters itself more than two million refugees] in Europe. The problem will not solve itself. The influx of refugees will not stop as long as the war continues. Much has to be done to end this conflict, and the whole world will be involved. Meanwhile, we have to make every effort to manage the flow of refugees, to offer people a safe place to stay, in the region, in the EU and in the rest of the world.' (12)

7. Very large numbers of Syrian displaced persons therefore joined existing patterns of persons making their way towards the European Union from other war-torn or famine-struck corners of the globe: (13) from Afghanistan and Iraq. The appalling maritime tragedies of overloaded, leaking inflatable boats that sank crossing the Mediterranean during the summer months of 2015 captured most of the media attention. But there was a second, major, overland migration route towards the European Union: ‘the West Balkans Route’.

8. That route involved a journey by sea and/or by land from Turkey westwards to Greece, then into the Western Balkans. Individuals travelled primarily through the FYR Macedonia, Serbia, Croatia, Hungary and Slovenia. (14) The route first became a popular passageway into the European Union in 2012 when Schengen visa restrictions were relaxed for five Balkan countries – Albania, Bosnia and Herzegovina, Montenegro, Serbia and the FYR Macedonia. Until March 2016 many people were thus able to travel on a single major route leading from Turkey to Greece and then northwards through the Western Balkans. (15)

9. Those travelling along the Western Balkans Route did not want to stay in the countries they had to pass through in order to reach their destination of choice. Those countries also did not wish them to remain. The FYR Macedonia and the Serbian authorities provided transport (which was paid for by the individuals using it) (16) and allowed people using the route to cross the border into Croatia, in particular after the border with Hungary was closed. The Croatian and the Slovenian authorities also provided transport (this time, free of charge) and allowed the individuals to cross their respective borders towards Austria and Germany. The policy of the Western Balkans States in allowing these third-country nationals to enter their territories and providing facilities such as transport to take them to the border en route to their destination of choice has been described as ‘waving through’ or ‘wave through’.

10. On 27 May 2015 the Commission proposed, inter alia, a Council Decision based on Article 78(3) TFEU to establish an emergency mechanism to assist principally Italy and Greece as they were generally the first Member States of entry and were thus confronted by a sudden inflow of third-country nationals. This was the first proposal made to trigger that provision. On 14 September 2015 the Council adopted a decision on that proposal. (17) In so doing the Council noted that the specific situation of Greece and Italy had implications in other geographical regions, such as the ‘Western Balkans migratory Route’. (18) The aims of Decision 2015/1523 included the relocation of applicants for international protection who lodged applications for asylum in one of those States. Another objective was to allow a temporary suspension of the rules in the Dublin III Regulation, notably the criterion that placed responsibility for examining applications for international protection on the Member State of first entry where the applicant irregularly crossed the border from a third country. The avowed aim of the measure was to relocate 40 000 applicants within two years to other Member States. The decision was adopted by unanimous vote.

11. Within a week the Council adopted a second decision providing for a relocation scheme for 120 000 third-country nationals in need of international protection. (19) Decision 2015/1601 also introduced a distribution key indicating how the third-country nationals concerned were to be placed in the Member States. (20) That decision was politically controversial and it was adopted by a qualified majority vote. (21) On 25 October 2015 a high level meeting took place at the invitation of the President of the Commission which included both EU and non-EU States. (22) The participants agreed on a series of measures (set out in a ‘Statement’) in order to improve cooperation and establish consultation between the countries along the Western Balkans Route. They also decided on measures (to be implemented immediately) aimed at limiting secondary movements, providing shelter for third-country nationals, managing borders and combatting smuggling and trafficking. (23) Both the precise legal basis

and the precise legal effect of those measures are unclear. (24)

12. Meanwhile, on 21 August 2015 Germany was described in the press as having ‘exempted’ Syrian nationals from the Dublin III Regulation. (25) In September 2015 it reinstated border controls with Austria after having received hundreds of thousands of people in a few days. It removed the so-called ‘exemption’ in November 2015.

13. On 15 September 2015 Hungary closed its border with Serbia. A consequence of the closure was that a large influx of people was re-routed to Slovenia. On 16 October 2015 Hungary erected a fence along its border with Croatia. Between November 2015 and February 2016 the FYR Macedonia erected a fence along its border with Greece.

14. By the end of October 2015 nearly 700 000 people had travelled along the Western Balkans Route from Greece to central Europe. The numbers have variously been described as ‘unprecedented’, a ‘massive inflow’ and ‘exceptional’. The statistics regarding entry and registration vary between the countries along the route. Approximate daily arrivals in Serbia were 10 000 (October) and 5 000 (November). (26)

15. On 11 November 2015 Slovenia started to erect a fence along its border with Croatia. In December 2015 Austria erected a fence at the main border crossing with Slovenia. Austria had meanwhile temporarily reintroduced controls at internal borders on 16 September 2015.

16. On 14 February 2016 Austria announced that it was admitting people from Afghanistan, Iraq and Syria only. On 18 February 2016 the heads of various police services held a meeting in Zagreb and a Statement was issued. (27) The policy of waving people through the Western Balkans States stopped when Austria changed its liberal asylum policy (that is, in February 2016).

17. As regards other States, France temporarily reintroduced controls at internal borders between July 2016 and January 2017. Denmark introduced a similar initiative, subsequently prolonging controls from 4 January to 12 November 2016. Norway reintroduced internal border controls from 26 November 2015 to 11 February 2017 and Sweden adopted measures of the same kind from 12 November 2015 to 11 November 2016.

18. The sheer numbers of people travelling along the Western Balkans Route within a relatively short space of time in late 2015 and early 2016 together with the political difficulties that ensued are commonly described in shorthand as ‘the refugee crisis’ or ‘the humanitarian crisis’ in the Western Balkans. It was the greatest mass movement of persons across Europe since World War II. These were the wholly exceptional circumstances that form the background to these two references for a preliminary ruling.

International law

The Geneva Convention

19. Article 31(1) of the Geneva Convention relating to the Status of Refugees (28) prohibits the imposition of penalties, on account of their illegal entry or presence, on refugees who flee a territory where their life or freedom was threatened, where they are present in a State without authorisation, provided they present themselves to the authorities and show good cause for their illegal entry or presence. In accordance with Article 31(2), States should not apply restrictions to the movements of refugees within their territory other than those which are necessary. Any restrictions should be applied

only until the refugees' status is regularised or they obtain admission to another country. States must allow refugees a reasonable period and the necessary facilities to obtain admission to another country.

The Convention for the Protection of Human Rights and Fundamental Freedoms

20. Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (29) provides that no one is to be subjected to inhuman or degrading treatment or punishment.

EU legislation

The Charter

21. Article 4 of the Charter of Fundamental Rights of the European Union (30) corresponds to Article 3 of the ECHR. Article 18 of the Charter guarantees the right to asylum with due respect for the rules of the Geneva Convention.

The Dublin system

The Dublin III Regulation

22. The rules governing the territorial scope of the Dublin III Regulation are complex. Its predecessor, the Dublin II Regulation applied in Denmark from 2006 by virtue of the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention. (31) There is no corresponding agreement in relation to the Dublin III Regulation. In accordance with Article 3 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, those Member States have notified their wish to take part in the adoption and application of the Dublin III Regulation. The regulation applies to other EU Member States in the ordinary way, without qualification.

23. Pursuant to the Agreement between the European Union and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, the Dublin III Regulation applies to that State. (32)

24. The preamble to the Dublin III Regulation includes the following statements.

- The Common European Asylum System ('the CEAS') is part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the European Union. It is based on the full and inclusive application of the Geneva Convention. The CEAS should include, in the short-term, a clear and workable method for determining the Member State responsible for the examination of an application for international protection. (33)
- Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It 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. (34)

- The Dublin system is a cornerstone of the CEAS as it clearly allocates responsibility among Member States for the examination of applications for international protection. (35)
- In applying the Dublin system it is necessary to take into account the provisions of the EU asylum *acquis*. (36)
- Protecting the best interests of the child and respect for family life are primary considerations in applying the Dublin III Regulation. (37) The processing together of applications for international protection of the members of one family by a single Member State is consistent with respect for the principle of family unity. (38)
- In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of the Charter. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred. (39)
- The progressive creation of an area without internal frontiers in which free movement of persons is guaranteed in accordance with the TFEU and the establishment of Union policies regarding the conditions of entry and stay of third-country nationals, including common efforts towards the management of external borders, makes it necessary to strike a balance between responsibility criteria in a spirit of solidarity. (40)
- With respect to the treatment of persons falling within the scope of the Dublin III Regulation, Member States are bound by their obligations under instruments of international law, including the relevant case-law of the European Court of Human Rights. (41)
- The Dublin III Regulation respects fundamental rights and observes the principles which are acknowledged, in particular, in the Charter. (42)

25. As Article 1 indicates, the Dublin III Regulation ‘lays down 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 Member State responsible”)’.

26. The following definitions are set out in Article 2:

‘(a) “third-country national” means any person who is not a citizen of the Union within the meaning of Article 20(1) TFEU and who is not national of a State which participates in [the Dublin III Regulation] by virtue of an agreement with the European Union;

(b) “application for international protection” means an application for international protection as defined in Article 2(h) of [the Qualification Directive];

(c) “applicant” means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;

(d) “examination of an application for international protection” means any examination of, or decision or ruling concerning, an application for international protection by the competent authorities in

accordance with [the Procedures Directive] and [the Qualification Directive], except for procedures for determining the Member State responsible in accordance with [the Dublin III Regulation];

...

(l) “residence document” means any authorisation issued by the authorities of a Member State authorising a third-country national or a stateless person to stay on its territory, including the documents substantiating the authorisation to remain on the territory under temporary protection arrangements or until the circumstances preventing a removal order from being carried out no longer apply, with the exception of visas and residence authorisations issued during the period required to determine the Member State responsible as established in this Regulation or during the examination of an application for international protection or an application for a residence permit;

(m) “visa” means the authorisation or decision of a Member State required for transit or entry for an intended stay in that Member State or in several Member States. The nature of the visa shall be determined in accordance with the following definitions:

- “long-stay visa” means an authorisation or decision issued by one of the Member States in accordance with its national law or Union law required for entry for an intended stay in that Member State of more than three months,
- “short-stay visa” means an authorisation or decision of a Member State with a view to transit through or an intended stay on the territory of one or more or all the Member States of a duration of no more than three months in any six-month period beginning on the date of first entry on the territory of the Member States,
- “airport transit visa” means a visa valid for transit through the international transit areas of one or more airports of the Member States;

...’

27. Pursuant to Article 3(1), Member States must examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. Any such application is to be examined by a single Member State, namely the one which the criteria set out in Chapter III indicate is responsible.

28. Article 3(2) provides:

‘Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.

Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of [the Charter], the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.

Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the

basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible.’

29. The criteria for determining the Member State responsible (for the purposes of Article 1) are laid down in Chapter III (‘the Chapter III criteria’). Article 7(1) states that the criteria are to be applied in accordance with the hierarchy set out in that chapter. The Member State responsible is determined on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State as provided in Article 7(2). At the top of the hierarchy are the criteria relating to minors (Article 8) and family members (Articles 9, 10 and 11). They are not directly at issue in either of the main proceedings. (43)

30. Next in the hierarchy is Article 12, which sets out the conditions for the criterion relating to the issue of residence documents or visas. Under Article 12(1), where an applicant has a valid residence document, the Member State which issued the document shall be responsible for examining the application for international protection. In accordance with Article 12(2), where an applicant is in possession of a valid visa, the Member State which issued the visa shall be responsible for examining the application for international protection, unless the visa was issued on behalf of another Member State under a representation arrangement as provided for in Article 8 of Regulation (EC) No 810/2009. (44) In such a case, the represented Member State shall be responsible for examining the application for international protection.

31. Article 13 is entitled ‘Entry and/or stay’. Article 13(1) provides:

‘Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) of this Regulation, including the data referred to in Regulation (EU) No 603/2013, [(45)] that an applicant 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 international protection. That responsibility shall cease 12 months after the date on which the irregular border crossing took place.’

32. The penultimate criterion, set out in Article 14, concerns ‘visa waived entry’. It states:

‘1. If a third-country national or a stateless person enters into the territory of a Member State in which the need for him or her to have a visa is waived, that Member State shall be responsible for examining his or her application for international protection.

2. The principle set out in paragraph 1 shall not apply if the third-country national or the stateless person lodges his or her application for international protection in another Member State in which the need for him or her to have a visa for entry into the territory is also waived. In that case, that other Member State shall be responsible for examining the application for international protection.’

33. The final criterion (Article 15) concerns applications for international protection made in an international transit area of an airport and is not relevant to the present references.

34. Member States have a discretion under Article 17(1) to derogate from Article 3(1) of the Dublin III Regulation and to decide to examine an application for international protection lodged by a third-country national even if, under the Chapter III criteria, such examination is not the responsibility of the Member State concerned.

35. Chapter V contains the provisions governing the obligations of ‘the Member State responsible’.

Within that chapter, Article 18 lists certain obligations, which include taking charge of an applicant who has lodged an application in a different Member State (Article 18(1)(a)) or taking back an applicant whose application is under examination and who made an application in another Member State or who is on the territory of another Member State without a residence document (Article 18(1)(b)).

36. Article 20(1) provides that the process of determining the Member State responsible must start as soon as an application for international protection is first lodged with a Member State. Applications for international protection are deemed to have been lodged once a form submitted by the applicant or a report prepared by the authorities reaches the competent authorities of the Member State concerned, as provided by Article 20(2). (46)

37. By virtue of Article 21, where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any event within three months of the date on which the application was lodged within the meaning of Article 20(2), request that other Member State to take charge of the applicant. In accordance with Article 22(1), (47) the requested Member State shall make the necessary checks and shall give a decision on the request to take charge of an applicant within two months of receipt of such a request. Article 22(7) provides that failure to act within that period is tantamount to accepting the request. (48)

38. Likewise, a request under Article 23 to take back an applicant who lodges a new application for international protection must be made as quickly as possible. By virtue of Article 25 the requested Member State must reply as quickly as possible – no later than one month from the date on which the request was received. Under Article 25(2), failure to do so is treated as acceptance of the request.

39. Certain procedural safeguards are set out in Articles 26 and 27. The former provides that where the requested Member State agrees to take charge of or take back an applicant, the requesting Member State must notify the person concerned of the decision to transfer him to the Member State responsible. That decision must contain information regarding the legal remedies available.

40. Under Article 27(1), applicants 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.

41. Article 29 provides:

‘1. The transfer of the applicant or of another person as referred to in Article 18(1)(c) or (d) from the requesting Member State to the Member State responsible shall 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 [of] 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).

...

2. Where the transfer does not take place within the six months’ time limit, the Member State responsible shall be relieved of its obligations to take charge [of] 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.

...’ (49)

42. Article 33 is entitled ‘A mechanism for early warning, preparedness and crisis management’. Article 33(1) states: ‘Where, on the basis of, in particular, the information gathered by [the European Asylum Support Office: ‘the EASO’] pursuant to Regulation (EU) No 439/2010, [(50)] the Commission establishes that the application of this Regulation may be jeopardised due either to a substantiated risk of particular pressure being placed on a Member State’s asylum system and/or to problems in the functioning of the asylum system of a Member State, it shall, in cooperation with [the EASO], make recommendations to that Member State, inviting it to draw up a preventive action plan.

...’

Rules implementing the Dublin III Regulation

43. Regulation (EU) No 603/2013 (51) established the Eurodac system. Its purpose is to assist in determining which Member State is responsible pursuant to the Dublin III Regulation for examining an application for international protection lodged in a Member State by a third-country national.

44. Annex II of Commission Implementing Regulation (EU) No 118/2014 laying down detailed rules for the application of the Dublin III Regulation (52) contains two lists indicating the means of proof for determining the Member State responsible for the purposes of the Dublin III Regulation. List ‘A’ refers to formal proof which determines responsibility as long as it is not refuted by proof to the contrary. List ‘B’ refers to circumstantial evidence: indicative elements which, although refutable, may be sufficient in certain circumstances to determine responsibility.

Schengen

45. In some guise or another, free movement between European countries has been taking place since the Middle Ages. (53) The Schengen Agreement, signed on 14 June 1985, covered the gradual abolition of internal borders and provided control of the external border of the States signatory. On 19 June 1990 the Convention Implementing the Schengen Agreement was signed. (54) The convention covered issues such as the organisation and management of the external border and the abolition of internal border controls, procedures for issuing a uniform visa and the operation of a single database for all members (the Schengen Information Service (‘the SIS’)), as well as establishing a means for cooperation between the members’ immigration services. Those matters were brought within the framework of the EU *acquis* by the Treaty of Amsterdam. All 28 EU Member States do not participate fully in the Schengen *acquis*. (55) There are particular arrangements for Ireland and the United Kingdom. (56)

The Schengen Borders Code

46. The recitals of the Schengen Borders Code (57) make the following pertinent statements. The creation of an area in which individuals move freely is to be flanked by other measures, such as a common policy on the crossing of external borders. (58) In that respect, the establishment of a ‘common corpus’ of legislation is one of the fundamental components of the common policy on the management of the external borders. (59) Border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control.

47. The recitals go on to state that border controls should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States’ internal security, public policy, public health and international relations. (60) Border checks should be performed in such a way

as to fully respect human dignity. Border control should be carried out in a professional and respectful manner and be proportionate to the objectives pursued. (61) Border control comprises not only checks on persons at border crossing points and surveillance between these border crossing points, but also an analysis of the risks for internal security and analysis of the threats that may affect the security of external borders. It is therefore necessary to lay down the conditions, criteria and detailed rules governing checks at border crossing points and surveillance. (62) Provision should be made for relaxing checks at external borders in the event of exceptional and unforeseeable circumstances in order to avoid excessive waiting time at border crossing points. Even if border checks are relaxed, however, the systematic stamping of the documents of third-country nationals remains obligatory. Stamping makes it possible to establish with certainty the date on which, and where, the border was crossed, without establishing in all cases that all required travel document control measures have been carried out. (63)

48. Article 1 effectively sets out a twofold objective for the Schengen Borders Code. First, it provides for the absence of border control of persons crossing the borders between participating Member States. Second, it establishes rules governing border control of persons crossing the external border of the Member States of the European Union.

49. The following definitions are set out in Article 2:

‘ ...

2. “external borders” means the Member States’ land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders;

...

5. “persons enjoying the ... right of free movement under Union law” means:

- (a) Union citizens within the meaning of [Article 20(1) TFEU], and third-country nationals who are members of the family of a Union citizen exercising his or her right to free movement to whom Directive 2004/38/EC of the European Parliament and of the Council [(64)] applies;
- (b) third-country nationals and their family members, whatever their nationality, who, under agreements between the Union and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens;

6. “third-country national” means any person who is not a Union citizen within the meaning of Article 20(1) of the Treaty and who is not covered by point 5 of [Article 2];

7. “persons for whom an alert has been issued for the purposes of refusing entry” means any third-country national for whom an alert has been issued in the Schengen Information System (SIS) in accordance with and for the purposes laid down in Article 96 of the [CISA];

8. “border crossing point” means any crossing-point authorised by the competent authorities for the crossing of external borders;

...

9. “border control” means the activity carried out at a border, in accordance with and for the purposes of

this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance;

10. “border checks” means the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it;

11. “border surveillance” means the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks;

...

13. “border guard” means any public official assigned, in accordance with national law, to a border crossing point or along the border or the immediate vicinity of that border who carries out, in accordance with this Regulation and national law, border control tasks;

...

15. “residence permit” means:

- (a) all residence permits issued by the Member States according to the uniform format laid down by Council Regulation (EC) No 1030/2002 [(65)] and residence cards issued in accordance with Directive 2004/38/EC;
- (b) all other documents issued by a Member State to third-country nationals authorising a stay on its territory, that have been the subject of a notification and subsequent publication in accordance with Article 34, with the exception of:
 - (i) temporary permits issued pending examination of a first application for a residence permit as referred to in point (a) or an application for asylum; and
 - (ii) visas issued by the Member States in the uniform format laid down by Council Regulation (EC) No 1683/95;

...’ (66)

50. Pursuant to Article 3, the Schengen Borders Code covers ‘any person crossing the internal or external borders of Member States, without prejudice to: (a) the rights of persons enjoying the right of free movement under Union law; and (b) the rights of refugees and persons requesting international protection, in particular as regards non-refoulement’.

51. Under Article 3a, Member States must act in full compliance with relevant EU law, including the Charter, the Geneva Convention and fundamental rights when applying the regulation. That includes an obligation to take decisions on an individual basis.

52. Article 5 is entitled ‘Entry conditions for third-country nationals’. In accordance with Article 5(1), the conditions for such a person whose intended stay is of no more than 90 days in any 180-day period (67) are as follows: (a) possession of a valid travel document entitling him to cross the border; (b) possession of a valid visa; (c) he should justify the purpose and conditions of his intended stay, and

he should have sufficient means of subsistence, both for the duration of the intended stay and for the return to his country of origin or transit to a third country into which he is certain to be admitted, or is in a position to acquire such means lawfully; (d) he is not a person for whom an alert has been issued in the SIS for the purposes of refusing entry; and (e) he is not, *inter alia*, considered to be a threat to public policy or internal security. (68)

53. By way of derogation from those requirements, Article 5(4)(c) provides that ‘third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations. Where the third-country national concerned is the subject of an alert as referred to in paragraph 1(d), the Member State authorising him or her to enter its territory shall inform the other Member States accordingly’.

54. Article 8 allows border guards to relax the checks that are to be conducted at the external border in exceptional and unforeseen circumstances. Such exceptional and unforeseen circumstances shall be deemed to be those where unforeseeable events lead to traffic of such intensity that the waiting time at the border crossing point becomes excessive, and all resources have been exhausted as regards staff, facilities and organisation.

55. However, Article 8(3) states that even where checks are relaxed, the border guard must nonetheless stamp the travel documents of third-country nationals both on entry and exit, in accordance with Article 10(1), which provides that the travel documents of third-country nationals must be systematically stamped on entry and exit. Stamps must be affixed to: (a) the documents, bearing a valid visa, enabling third-country nationals to cross the border; (b) the documents enabling third-country nationals to whom a visa is issued at the border by a Member State to cross the border; and (c) the documents enabling third-country nationals not subject to a visa requirement to cross the border.

56. Article 13 states that a third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.

The SIS

57. The SIS is in essence an information system that supports external border control and law enforcement cooperation in the States that are party to the Schengen Borders Code (‘the Schengen States’). Its main purpose is to assist in preserving internal security in those States in the absence of internal border checks. (69) That is ensured, *inter alia*, by means of an automated search procedure which provides access to alerts on persons for the purposes of border checks. In relation to third-country nationals (that is, individuals who are not EU citizens or nationals of States who under agreements with the European Union and the States concerned enjoy rights to freedom of movement equivalent to those of EU citizens), (70) Member States must enter an alert within the SIS where a competent authority or a court takes a decision refusing entry or stay, based on a threat to public policy or public security or to national security which the presence of that individual may pose. (71) Alerts may also be entered when such decisions are based on the fact that the third-country national has been subject to a measure involving expulsion, refusal of entry or removal which has not been rescinded or suspended. (72)

Regulation (EC) No 1683/95

58. Council Regulation (EC) No 1683/95 (73) lays down a uniform format (sticker) for visas issued by the Member States which must conform to the specifications in the Annex thereto. The specifications cover 'security features', such as an integrated photograph, an optically variable mark, a logo of the issuing Member State, the word 'visa', and a nine digit national number.

Regulation (EC) No 539/2001

59. Annex I to Council Regulation (EC) No 539/2001 lists the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. (74) That requirement is without prejudice to the European Agreement on the Abolition of Visas for Refugees. (75) The third-country nationals of the States listed in Annex II are exempt from the requirement for short-stay visas. Member States are also entitled to provide exception from the visa requirement for certain limited categories of persons. (76)

Visa Information System

60. The Visa Information System ('the VIS') was established by Council Decision 2004/512/EC. (77) Pursuant to Article 1 of Regulation (EC) No 767/2008, (78) the VIS allows the Schengen States to exchange visa data on applications for short-stay visas and on the decisions taken in relation thereto. Article 2(f) states that the objectives of the VIS include facilitating the application of the Dublin II Regulation. In accordance with Article 4, a 'visa' is defined by reference to the CISA. A visa sticker refers to the uniform format for visas defined in Regulation No 1683/95. The expression 'travel document' means a passport or other equivalent document entitling the holder to cross the external borders and to which a visa may be affixed.

61. Article 21 provides that for the sole purpose of determining the Member State responsible for examining an asylum application where that involves establishing whether a Member State has issued a visa or whether the applicant for international protection has 'irregularly crossed the border of a Member State' (under what are now Articles 12 and 13 respectively of the Dublin III Regulation), the competent authorities must have access to search the database against the fingerprints of the asylum seeker concerned.

Regulation No 810/2009

62. As Article 1(1) of Regulation No 810/2009 states, that regulation establishes the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding 90 days in any 180-day period. The requirements apply to any third-country national who must possess a valid visa when crossing the external borders of a Member State.

63. Article 2 defines a third-country national as any person who is not an EU citizen. A visa is an authorisation issued by a Member State with a view to either transit through, or an intended stay in, the territory of the Member States of a duration of no more than three months in any six-month period from the date of first entry into the territory of the Member States or transit through the international transit areas of airports of the Member States. A 'visa sticker' means the uniform format for visas as defined by Regulation No 1683/95. Recognised travel documents are documents recognised by one or more Member States for the purpose of affixing visas. (79)

The Procedures Directive

64. As its title suggests, the Procedures Directive establishes common procedures for granting and

withdrawing international protection pursuant to the Qualification Directive. Article 3 states that the directive applies to all such applications made within the territory of the European Union.

65. In accordance with Article 31, Member States must ensure that applications for international protection are processed pursuant to the examination procedure laid down in the directive as soon as possible. (80) The general rule is that the examination procedure should be concluded within six months of an application being lodged. However, where applications are subject to the procedure laid down in the Dublin III Regulation, the six months' time limit starts to run from the moment the Member State responsible for examining the individual's application is determined under that regulation. (81) Member States may provide that the examination procedure is to be accelerated and/or conducted at the border or in transit zones if an applicant, inter alia, enters the territory of the Member State concerned 'unlawfully', or refuses to have his fingerprints taken in accordance with the Eurodac Regulation. (82)

The Return Directive

66. Article 1 of Directive 2008/115/EC (83) states that that directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of EU law as well as international law, including refugee protection and human rights obligations.

67. Article 2 provides that the directive applies to third-country nationals staying illegally on the territory of a Member State. Member States may decide not to apply the directive to third-country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.

68. In accordance with Article 3, a third-country national means any person who is not an EU citizen and who does not enjoy free movement rights as defined in Article 2(5) of the Schengen Borders Code. The expression 'illegal stay' is defined as 'the presence on the territory of a Member State of a third-country national who does not fulfil, or no longer fulfils, the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State'. (84)

The requests for preliminary rulings

69. In these two references for preliminary rulings, the Court is asked for guidance on the interpretation of the Dublin III Regulation and the Schengen Borders Code. *A.S.* (85) is a reference from the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia). *Jafari* (86) has been referred by the Verwaltungsgerichtshof Wien (Supreme Administrative Court, Vienna) (Austria).

70. The questions raised by the two referring courts are linked and overlap substantially. I shall therefore deal with both cases in one Opinion. I shall use the word 'migration' generically to describe the inflow of third-country nationals between September 2015 and March 2016 ('the material time'). That inflow included both people who were refugees or intending to apply for international protection within the European Union and migrants in the more general sense of that word. (87)

Case C-490/16 A.S.

Facts, procedure and questions referred

71. The referring court states that Mr A.S., a Syrian national, left Syria for Lebanon and from there travelled to Turkey, then Greece, the FYR Macedonia, Serbia, Croatia and Slovenia. It is common ground between the parties that he travelled through Serbia in an organised manner by means of what is described as a ‘migrants’ train’, that he entered Croatia from Serbia and that, at the designated crossing point of the national border, he was accompanied by the Serbian State authorities. He was transferred to the Croatian national border-control authorities. The latter did not prevent him from entering Croatia, did not initiate a procedure to expel him from Croatian territory and did not ascertain whether he fulfilled the conditions for lawful entry into Croatia. Rather, the Croatian authorities organised onwards transport to the Slovenian national border.

72. On 20 February 2016 Mr A.S. entered Slovenia with the inflow of people on the ‘migrants’ train’ at the border post of Dobova, where he was registered. On the following day (21 February 2016) he together with other third-country nationals travelling through the Western Balkans were taken to the Austrian security authorities at Slovenia’s border with Austria, who sent them back to Slovenia. On 23 February 2016 Mr A.S. lodged an application for international protection with the Slovenian authorities. On that same day the Slovenian authorities sent a letter to the Croatian authorities in accordance with Article 2(1) of the Agreement between the two countries on the extradition and return of individuals who entered or stayed irregularly within Slovenian territory (an international agreement). Slovenia asked Croatia to take back 66 people of whom Mr A.S. was one. By letter of 25 February 2016 the Croatian authorities confirmed that they would take those persons back. A formal take-back request under the Dublin III Regulation was made by Slovenia on 19 March 2016. On 18 May 2016 the Croatian authorities confirmed their acceptance that Croatia was the Member State responsible.

73. By decision of 14 June 2016 the Slovenian Ministry of the Interior (‘the Slovenian Ministry’) informed Mr A.S. that his application for international protection would not be examined by Slovenia and that he would be transferred to Croatia, as the Member State responsible (‘the Slovenian Ministry’s decision’).

74. That decision was based on the criterion in Article 13(1) of the Dublin III Regulation. In accordance with that provision, where a third-country national has irregularly crossed the border of a Member State, that Member State is responsible for examining an application for international protection. Whether there has been an irregular border crossing in any particular case is established by reference to proof or circumstantial evidence as described in the two lists in Annex II to the Dublin Implementing Regulation which includes any available data in Eurodac.

75. The Slovenian Ministry took the view that Mr A.S. entered Croatia irregularly during February 2016. It also took into account that on 18 May 2016 the Croatian authorities responded positively to the Slovenian authorities’ request to take charge of Mr A.S.’s application under the Dublin III Regulation on the basis of the criterion in Article 13(1) of that regulation, to the effect that Croatia is the Member State competent for examining Mr A.S.’s application. (88) The Eurodac system did not provide a positive match for Croatia for Mr A.S., but that is not decisive for interpreting Article 13(1) of the Dublin III Regulation. The action of the national authorities when individuals from the ‘migrants’ train’ crossed the national border into Croatia had been the same as in cases in which migrants had been registered in the Eurodac system.

76. On 27 June 2016 Mr A.S. challenged that decision before the Upravno sodišče (Administrative Court, Slovenia) on the grounds that the Article 13(1) criterion had been wrongfully applied. The Croatian State authorities’ conduct must be interpreted as meaning that he entered Croatia lawfully.

77. On 4 July 2016 that challenge was rejected, but Mr A.S. was successful in obtaining suspension of the Ministry's decision.

78. He appealed against the first instance decision to the referring court on 7 July 2016. The latter takes the view that in order to determine which Member State is responsible for examining Mr A.S.'s application for international protection, it needs guidance as to the interpretation of the condition in Article 13(1) of the Dublin III Regulation 'that an applicant has irregularly crossed the border into a Member State'. The referring court wishes in particular to know whether the words 'irregularly crossed' should be interpreted independently or in conjunction with Article 3(2) of the Return Directive and Article 5 of the Schengen Borders Code. The referring court also seeks to ascertain whether the fact that Mr A.S. crossed the border from Serbia to Croatia under the supervision of the Croatian authorities, even though he did not meet the requirements of Article 5(1) of the Schengen Borders Code (because he did not possess the necessary documents, such as a valid visa), is relevant in assessing whether his entry into EU territory was irregular.

79. The referring court further seeks guidance on the application of certain procedural aspects of the Dublin III Regulation, namely whether Mr A.S.'s right to an effective remedy under Article 27 of that regulation covers the assessment in law of how the terms 'irregular' or 'unlawful entry' into a Member State in Article 13(1) are to be applied. If the answer to that question is affirmative, it then becomes necessary to establish how the time limits in Articles 13(1) and 29(2) of the Dublin III Regulation operate. In essence the referring court wants to know if time continues to run where a challenge is lodged under Article 27(1), in particular where a transfer has been ruled out pursuant to Article 27(3).

80. On 13 September 2016 the referring court therefore sought a preliminary ruling on the following questions:

'(1) Does judicial protection under Article 27 of [the Dublin III Regulation] concern also the interpretation of the conditions of the criterion under Article 13(1) in respect of a decision that the Member State will not examine the application for international protection, that another Member State has already assumed responsibility for examining the applicant's application on the same basis and where the applicant challenges this?

(2) Is the condition of irregular crossing under Article 13(1) of [the Dublin III Regulation] to be interpreted independently or in conjunction with Article 3(2) of [the Return Directive] and Article 5 of the Schengen Borders Code which define illegal crossing of the border and must that interpretation be applied in relation to Article 13(1) of [that regulation]?

(3) In view of the answer to the second question, is the concept of irregular crossing under Article 13(1) of [the Dublin III Regulation] in the circumstances of the present case to be interpreted as meaning that there is no irregular crossing of the border where the public authorities of a Member State organise the crossing of the border with the aim of transit to another Member State of the EU?

(4) In the event that the answer to the third question is in the affirmative, is Article 13(1) of [the Dublin III Regulation] consequently to be interpreted as meaning that it prohibits sending a national of a third State back to the [Member] State where he initially entered EU territory?

(5) Is Article 27 of [the Dublin III Regulation] to be interpreted as meaning that the time limits of Article 13(1) and Article 29(2) do not run where the applicant exercises the right to judicial protection, *a fortiori* where that implies also a question for a preliminary ruling or where the national court is

awaiting the answer of the [Court] to such a question which has been submitted in another case? In the alternative, would the time limits run in such a case, the Member State responsible however not being entitled to refuse reception?’

Procedure before the Court

81. The referring court asked this Court to apply the urgent preliminary reference procedure. The Court rejected that request by order dated 27 September 2016. The case was however subsequently accorded priority treatment by decision dated 22 December 2016, as it raises issues in common with Case C-646/16 *Jafari* which is subject to the expedited procedure.

82. Written observations have been submitted by Mr A.S., Greece, Hungary, Slovenia, the United Kingdom and Switzerland, and the European Commission. Given the similarities with Case C-646/16 *Jafari*, the Court decided to organise a joint hearing of the two cases. (89)

Case C-646/16 Jafari

Facts, procedure and questions referred

83. Ms Khadija Jafari and Ms Zainab Jafari are nationals of Afghanistan. They are sisters. Ms Khadija Jafari has a son, born in 2014, and Ms Zainab Jafari has two daughters, born in 2011 and 2007. The children are also Afghan nationals.

84. The two sisters together with their respective children (‘the Jafari families’) fled from Afghanistan, because their respective husbands had been taken by the Taliban and were required to fight in the Taliban’s army. They refused to do so and were killed by the Taliban. The respective fathers-in-law of the two Jafari sisters then kept the women locked behind closed doors: one considered that keeping his daughter-in-law behind lock and key was appropriate for religious reasons; the other thought that it would be safer for his daughter-in-law to be locked away. The Jafari sisters’ father managed to organise their flight from Afghanistan. The sisters fear that if they return to Afghanistan they will be locked away again by their respective families and they are also at risk of being stoned to death.

85. The Jafari families left Afghanistan during December 2015. With the assistance of a ‘people trafficker’ they first travelled via Iran (where they spent three months) through Turkey (where they spent around 20 days) to Greece (where they spent three days). The Greek authorities took biometric data from Ms Zainab Jafari and transmitted her digital fingerprints via Eurodac. The Jafari families then travelled through the FYR Macedonia, Serbia, Croatia and Slovenia before finally reaching Austria. No more than five days elapsed between their departure from Greece and their re-entry into EU territory.

86. From 18 November 2015 onwards, Croatia had started to filter the inflow of third-country nationals. It allowed only those from Afghanistan, Iraq and Syria – who were likely to qualify for refugee status – to pass through its territory. The Jafari families satisfied that test. In Croatia they requested access to a doctor to attend to one of Ms Zainab Jafari’s daughters. No assistance was forthcoming. They spent an hour waiting for a bus and were then taken across the border into Slovenia.

87. On 15 February 2016 the competent authorities in Slovenia drew up a document recording the Jafari families’ personal details. It indicated ‘NEMČIJA/DEU’ (‘journey destination Germany’) for Ms Zainab Jafari. For Ms Khadija Jafari, the letters ‘DEU’ had been struck out by hand and replaced by ‘AUT’ in manuscript (thus, ‘NEMČIJA /AUT’ ‘journey destination Austria’). (90) On the same day the

sisters crossed the Austrian border together and made their applications for international protection for themselves and for their children in that State. The Austrian authorities state that they had originally indicated that they wished to travel to Sweden. That is however disputed by the sisters.

88. The Austrian competent authority (the Austrian Federal Office for immigration and asylum (Bundesamt für Fremdenwesen und Asyl; ‘the Federal Office’ or ‘the BFA’)) did not verify the sisters’ account of their flight from Afghanistan, because it took the view that Croatia was the Member State responsible for examining their application for international protection. After having first approached the Slovenian authorities, by letter of 16 April 2016 the BFA requested the competent Croatian authority to take charge of the sisters and their children in accordance with Article 18(1)(a) of the Dublin III Regulation. The BFA asserted that, since the Jafari families had entered the territory of the Member States irregularly via Croatia, that Member State was responsible for examining their applications. The competent Croatian authority did not reply. Consequently, the BFA informed it by letter of 18 June 2016 that, under Article 22(7) of the Dublin III Regulation, responsibility for examining the applications for international protection now lay irrevocably with Croatia.

89. By decisions of 5 September 2016, the Federal Office rejected the applications for international protection as ‘inadmissible’, it noted that Croatia was responsible for examining the applications by virtue of Article 13(1) of the Dublin III Regulation and issued an expulsion order to the effect that the Jafari families should be returned to Croatia. In its statement of reasons, the Federal Office proceeded on the assumption that the sisters and their children had first entered the territory of the European Union in Greece. According to the BFA, they had, however, then left EU territory again and had subsequently re-entered the territory of the Member States in Croatia. The entries into Greece and Croatia were stated to have been irregular. In Greece, however, there were ongoing systemic failings in the asylum procedure. Therefore, in application of Article 13(1) of the Dublin III Regulation, Croatia was to be regarded as the Member State responsible. There were said to be no systemic failings in the asylum system there. The sisters contest that conclusion. [\(91\)](#)

90. Both the administrative authorities and the Bundesverwaltungsgericht (Federal Administrative Court, Austria) which ruled on their application challenging the contested decisions considered that the Jafari families’ account and the information given relating to their journey from Afghanistan were plausible. It is also not in dispute that the Jafari families’ odyssey took place during the mass inflow of third-country nationals into EU territory from the Western Balkans between September 2015 to March 2016.

91. By decisions of 10 October 2016 the Bundesverwaltungsgericht (Federal Administrative Court) dismissed the Jafari families’ appeals. In so doing, it essentially upheld the findings of the BFA. It found that when the Jafari families entered Croatia from Serbia they had crossed the border without an entry visa, although as Afghan nationals they should have had one. Thus, the entry across that border was irregular. As far as could be established, the entry into Austria had also been without a visa and was therefore likewise ‘irregular’.

92. The two sisters (but not their children) challenged that ruling on appeal before the referring court. They submit that the particular circumstances of their respective cases should be taken into account in establishing which Member State is responsible for examining their applications for international protection. They claim to have entered EU territory under Article 5(4)(c) of the Schengen Borders Code (that is, for humanitarian reasons). The border crossing was therefore not an ‘irregular entry’ for the purposes of Article 13(1) of the Dublin III Regulation. That was the reasoning behind the Agreement of 18 February 2016 allowing third-country nationals to enter EU territory to cross Member States in order

to reach the place where they wished to claim asylum. (92) Under Article 14(2) of the Dublin III Regulation, Austria is therefore the Member State responsible for examining their applications for international protection.

93. The referring court was aware that a reference had already been made by the Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia) in Case C-490/16 *A.S.* However, it is of the view that the underlying circumstances of the Jafari families' application for international protection differ from those in *A.S.* In the case of the Jafari families, the competent Croatian authority failed to respond to the take charge request made under Article 18(1)(a) of the Dublin III Regulation. The referring court considers that Article 13(1) of the Dublin III Regulation is the relevant Chapter III criterion which applies to determine the Member State responsible. That regulation does not however define 'irregular crossing' of the border. The referring court therefore seeks guidance as to whether that concept should be interpreted independently or by reference to other EU acts which lay down rules governing the requirements relating to third-country nationals who cross the EU external border, such as those in the Schengen Borders Code. In so far as the Croatian authorities allowed the Jafari families to enter their country and supervised their transport to the Slovenian border, the referring court asks whether such conduct is in effect a 'visa' for the purposes of Articles 2(m) and 12 of the Dublin III Regulation.

94. The Jafari families submit that the relevant Chapter III criterion is Article 14 (waiver of visa requirements). The referring court is not convinced that that view is correct. It therefore wishes to know whether that provision or Article 13(1) is the appropriate criterion to determine the Member State responsible. In view of the Court's rulings in *Ghezelbash* and *Karim*, (93) the referring court observes that an applicant can rely upon a wrongful application of the Dublin III criteria in an appeal against a transfer decision taken on the basis of that regulation. It is therefore necessary to ascertain which is the correct criterion to apply.

95. The referring court also questions the Jafari families' contention that they fall within the scope of Article 5(4)(c) of the Schengen Borders Code. It accordingly also seeks the Court's view on the correct interpretation of that provision.

96. Thus, the referring court asks the following questions:

- (1) Is it necessary, for the purpose of understanding Articles 2(m), 12 and 13 of [the Dublin III Regulation], for other acts, linked to that regulation, to be taken into account, or are those provisions to be interpreted independently of such acts?
- (2) In the event that the provisions of the Dublin III Regulation are to be interpreted independently of other acts:
 - (a) In the circumstances of the cases in the main proceedings, which are characterised by the fact that they fall within a period in which the national authorities of the States principally involved were faced with an unusually large number of people demanding transit through their territory, is the entry into the territory of a Member State, where such entry is de facto tolerated by that Member State and was intended to be solely for the purpose of transit through that Member State and the lodging of an application for international protection in another Member State, to be regarded as a "visa" within the meaning of Article 2(m) and Article 12 of the Dublin III Regulation?

If Question 2(a) is answered in the affirmative:

- (b) Must it be assumed, in the light of the fact that entry is de facto tolerated for the purpose of transit, that the “visa” ceased to be valid upon departure from the Member State concerned?
- (c) Must it be assumed, in the light of the fact that entry is de facto tolerated for the purpose of transit, that the “visa” continues to be valid if departure from the Member State concerned has not yet taken place, or does the “visa” cease to be valid, notwithstanding non-departure, at the point at which an applicant finally abandons his plan to travel to another Member State?
- (d) Does the applicant’s abandonment of his plan to travel to the Member State which he originally envisaged as being his destination mean that a fraud can be said to have been committed after the “visa” had been issued, within the meaning of Article 12(5) of the Dublin III Regulation, so that the Member State issuing the “visa” is not to be responsible?

If Question 2(a) is answered in the negative:

- (e) Is the expression used in Article 13(1) of the Dublin III Regulation, “has irregularly crossed the border into a Member State by land, sea or air having come from a third country”, to be interpreted as meaning that, in the special circumstances of the cases in the main proceedings referred to, an irregular crossing of the external border is to be regarded as not having taken place?
- (3) In the event that the provisions of the Dublin III Regulation are to be interpreted taking other acts into account:
- (a) In assessing whether, for the purposes of Article 13(1) of the Dublin III Regulation, there has been an “irregular crossing” of the border, must regard be had in particular to the question whether the entry conditions under the Schengen Borders Code – notably under Article 5 of [that act], which is particularly relevant to the cases in the main proceedings, given the timing of the entry – have been fulfilled?

If Question 3(a) is answered in the negative:

- (b) Of which provisions of EU law is particular account to be taken when assessing whether there has been an “irregular crossing” of the border for the purposes of Article 13(1) of the Dublin III Regulation?

If Question 3(a) is answered in the affirmative:

- (c) In the circumstances of the cases in the main proceedings, which are characterised by the fact that they fall within a period in which the national authorities of the States principally involved were faced with an unusually large number of people demanding transit through their territory, is the entry into the territory of a Member State, where such entry is, without any assessment of the circumstances of individual cases, de facto tolerated by that Member State and was intended to be solely for the purpose of transit through that Member State and the lodging of an application for international protection in another

Member State, to be regarded as authorisation to enter within the meaning of Article 5(4)(c) of the Schengen Borders Code?

If Questions 3(a) and 3(c) are answered in the affirmative:

- (d) Does authorisation to enter pursuant to Article 5(4)(c) of the Schengen Borders Code mean that an authorisation comparable to a visa within the meaning of Article 5(1)(b) of the Schengen Borders Code, and thus a “visa” under Article 2(m) of the Dublin III Regulation, must be deemed to exist, so that, when applying the provisions for establishing the Member State responsible under the Dublin III Regulation, regard must be had also to Article 12 of that regulation?

If Questions 3(a), 3(c) and 3(d) are answered in the affirmative:

- (e) Must it be assumed, in the light of the fact that entry is de facto tolerated for the purpose of transit, that the “visa” ceased to be valid upon departure from the Member State concerned?
- (f) Must it be assumed, in the light of the fact that entry is de facto tolerated for the purpose of transit, that the “visa” continues to be valid if departure from the Member State concerned has not yet taken place, or does the “visa” cease to be valid, notwithstanding non-departure, at the point at which an applicant finally abandons his plan to travel to another Member State?
- (g) Does the applicant’s abandonment of his plan to travel to the Member State which he originally envisaged as being his destination mean that a fraud can be said to have been committed after the “visa” had been issued, within the meaning of Article 12(5) of the Dublin III Regulation, so that the Member State issuing the “visa” is not to be responsible?

If Questions 3(a) and 3(c) are answered in the affirmative, but Question 3(d) is answered in the negative:

- (h) Is the expression used in Article 13(1) of the Dublin III Regulation, “has irregularly crossed the border into a Member State by land, sea or air having come from a third country”, to be interpreted as meaning that, in the special circumstances of the cases in the main proceedings referred to, a border crossing which is to be categorised as authorised entry for the purposes of Article 5(4)(c) of the Schengen Borders Code is not to be regarded as an irregular crossing of the external border?'

Procedure before the Court

97. Pursuant to Article 105 of the Rules of Procedure, the referring court requested that this case should be made subject to the expedited procedure. That request was granted by order of the President dated 15 February 2017.

98. Written observations have been submitted by the Jafari families, Austria, France, Hungary, Italy, Switzerland and the European Commission.

99. At the hearing on 28 March 2017 held jointly with Case C-490/16 *A.S.*, pursuant to Article 77 of

the Rules of Procedure, Mr A.S. and the Jafari families, as well as Austria, France, Greece, Italy, the United Kingdom and the Commission presented oral argument.

Assessment

Preliminary remarks

The Dublin system: a brief overview

100. The Dublin system establishes a procedure for determining the Member State responsible for examining an application for international protection. (94) The possibility that third-country nationals could travel freely within the Schengen area (95) created potential difficulties and a mechanism was designed to ensure that, in principle, only one participating State would be responsible for examining each request for asylum. The aims are, inter alia, to determine the Member State responsible rapidly, to prevent and discourage forum shopping, (96) to prevent and discourage secondary movements (97) and to avoid the phenomenon of asylum seekers ‘in orbit’ – that is, to avoid a situation in which each Member State claims that it has no responsibility because another Member State constitutes a safe third country and should therefore be responsible. (98) The Eurodac Regulation underpins the Dublin III Regulation.

101. The first set of criteria in Chapter III of the Dublin III Regulation allocate responsibility for examining applications on the basis of guaranteeing respect for the family unit. (99) The succeeding criteria aim to determine which State has contributed to the greatest extent to the applicant’s entry or residence within the territory of the Member States by issuing a visa or residence permit, by failing to be diligent in controlling its borders, or by waiving the requirement for the third-country national concerned to possess a visa. (100)

Schengen

102. Under the Schengen Borders Code, Member States have an obligation to maintain the integrity of the EU external border, which should be crossed only at certain authorised points. Third-country nationals must satisfy certain requirements. (101) A third-country national who crossed the border irregularly and who has no right to stay on the territory of the Member State concerned must be apprehended and made subject to the return procedures. (102) In practice, third-country nationals who arrive at the external borders of Member States often do not wish to request asylum there and refuse to have their fingerprints taken, if indeed the competent authorities seek to do so. (103) In principle, from that moment onwards the persons concerned could be designated illegally staying third-country nationals who do not fulfil the entry conditions set out in Article 5(1) of the Schengen Borders Code, pursuant to Article 3(2) of the Return Directive. (104)

103. The preferred procedure under the Return Directive is for voluntary return. In cases of forced return, the Member State concerned must issue an EU-wide entry ban and may place that information into the SIS.

104. The Dublin system, the Schengen *acquis* and the Return Directive appear to provide a comprehensive package of measures. However, the two cases at issue expose the lacunae and the practical difficulties in applying such rules where extraordinarily large numbers of people travel by land, rather than by air, to the European Union in a relatively short period of time to seek sanctuary. I have already described the circumstances that subsisted between September 2015 and March 2016. (105)

The general themes to the referring courts' questions

105. The questions posed by the two referring courts concern a number of common themes.

106. First, what general methodology should be applied to interpreting the criteria in Articles 12, 13 and 14 of the Dublin III Regulation? In particular, should those provisions be read in conjunction with the Schengen *acquis*? (106) Second, did the cooperation and facilities provided by the EU transit States (in particular, Croatia and Slovenia) amount in effect to visas within the meaning of Articles 2(m) and 12 of that regulation? (That question is not raised expressly in *A.S.*, but the Court's reply might nonetheless be of assistance to the referring court in determining the main proceedings.) (107) Third, how should Article 13(1) of the Dublin III Regulation be interpreted? In particular, what is the meaning of the phrase 'irregularly crossed the border' and what is the relationship (if any) between that provision and Article 5(1) of the Schengen Borders Code and Article 3(2) of the Return Directive? (108) Fourth, do those third-country nationals allowed to enter the Schengen area during the humanitarian crisis in the Western Balkans come within the exception in Article 5(4)(c) of the Schengen Borders Code to the entry conditions for third-country nationals? (109) Fifth, what constitutes 'visa waived entry' within the meaning of Article 14 of the Dublin III Regulation?

107. In *A.S.*, the Court is also asked to examine certain procedural aspects of the Dublin III Regulation. (110) Finally, it is necessary to assess the practical consequences of the interpretation of the provisions at issue for the two cases. (111)

108. Those questions are asked in a context in which one Member State was described as having suspended the application of the Dublin III Regulation for a period of time, whilst others were described as having 'suspended Schengen' in so far as they erected barriers across their internal borders with other EU Member States that are also in the Schengen area. (112)

109. The Court's function is exclusively judicial: to ensure, in accordance with Article 19(1) TEU, that 'in the interpretation and application of the Treaties the law is observed'. It is self-evidently *not* for the Court to enter the political arena in order to address the (thorny) question of how, given the geography of Europe, to allocate applicants for international protection between the Member States of the European Union. The unprecedented circumstances that pertained in the Western Balkans between September 2015 and March 2016 nevertheless thrust into the limelight the mismatch between geography and the elaborate criteria in Chapter III of the Dublin III Regulation. Put bluntly, the Court is now asked to provide a legal solution and to fit it retrospectively to a factual situation with which the applicable legal rules are ill-equipped to deal. Whichever solution is chosen is likely to be controversial in some quarter.

First issue: methodology to be applied when interpreting the criteria in Articles 12, 13 and 14 of the Dublin III Regulation

110. The referring courts in *A.S.* and *Jafari* seek to ascertain whether it is necessary to take account of other EU acts linked to the Dublin III Regulation or whether that regulation (in particular Articles 2(m), 12, 13 and 14 thereof) should be construed independently of such acts. It is common ground that transit was arranged with the cooperation of the States concerned. Thus, the question necessarily arises as to whether the rules relating to third-country nationals who cross the European Union's external borders impinge upon the interpretation of the Dublin III Regulation.

111. The applicants in *Jafari* together with Austria, France, Greece, Hungary, Switzerland and the

Commission submit that the Chapter III criteria should be construed in conjunction with other acts, namely the Schengen Borders Code and the Return Directive.

112. Mr A.S. argues that the interpretation of the Chapter III criteria should not be based on national or international rules alone. It must take account of the factual situation and the obligations of the EU transit States, which acted in accordance with Article 33 of the Geneva Convention and Article 3 of the ECHR (the prohibition against torture), as well as Articles 4(2) and 5(4) of the Schengen Borders Code.

113. Italy considers that the key issue is not whether the general approach to interpretation takes account of other EU acts or not. It states, first, that between September 2015 and March 2016 the EU transit States did not issue visas to those passing through their territory. Second, it emphasises that Article 13(1) of the Dublin III Regulation should be interpreted in the light of the Geneva Convention.

114. In the United Kingdom's view the Schengen Borders Code and the Return Directive have no legal bearing on the term 'irregular crossing' in Article 13(1) of the Dublin III Regulation. The latter should therefore be interpreted independently of those acts.

115. I do not see the approach to interpreting the Chapter III criteria as being a binary choice between two options: construing the Dublin III Regulation in total isolation, or construing it in a manner that results in the terms of that regulation being defined by reference to the enacting provisions of other EU acts.

116. It is settled case-law that when interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part. (113) The first of the 'General principles' in the 'Joint Practical Guide for the drafting of EU legislation' (114) states that legislation must be clear, simple and precise, leaving no uncertainty in the mind of the reader. Where an act shares common definitions with other EU legislation, it would be reasonable to expect to find an express cross reference, as the concept of a definition which is to be incorporated by implication is inconsistent with the principle of legal certainty. (115) Neither the Schengen Borders Code nor the Return Directive include definitions which cross refer to the Chapter III criteria in the Dublin III Regulation.

117. The wording of Article 12 of the Dublin III Regulation differs from Articles 13 and 14 in so far as it does expressly cross refer to the Visa Code which is part of the Schengen *acquis*. That reference is sufficiently clear, simple and precise to indicate that the Visa Code is relevant to the interpretation of that provision. (116) That said, it does not follow that the word 'visa' in Article 12 is limited to the definition that falls within the scope of the Visa Code. (117)

118. First, the Dublin III Regulation applies to Member States that are not part of the Schengen *acquis*, notably Ireland and the United Kingdom. In relation to those States, 'visa' must refer to a document recognised as such under national rules. Second, 'visa' covers categories of document beyond the short-stay visa which is within the scope of the Visa Code. It is clear from the wording of Article 2(m) of the Dublin III Regulation that that act applies to three different types of visa. (118)

119. That reasoning applies equally to Article 14 where the word 'visa' is also used. That term must also be construed in the same way as Article 12 for the sake of coherence and consistency.

120. It follows that the Schengen *acquis* is a relevant element to consider when interpreting the word 'visa', but that it does not determine the meaning of that term for the purposes of Articles 2(m) and 12 of the Dublin III Regulation.

121. Article 13 of the Dublin III Regulation makes no express reference to any measures in the Schengen *acquis* or to the Return Directive.

122. However, the statutory context indicates that the Dublin III Regulation is an integral part of the CEAS which is based on the full and inclusive application of the Geneva Convention. [\(119\)](#) That convention provides the international framework for the protection of refugees and those who seek refugee status. In ac