



Discretionary clause

Findings of the Court of Justice of the European Union

In reference to the **applicability of the Charter** – the answer would be yes, Article 4.

With regards to the second question the Court ruled that Article 17(1) of the Dublin III Regulation must be interpreted as meaning that the question of the application, by a Member State, of the 'discretionary clause' laid down in that provision is not governed solely by national law and by the interpretation given to it by the constitutional court of that Member State, but is a question concerning the interpretation of EU law, within the meaning of Article 267 TFEU.

Furthermore, the Court states that the provisions in the Dublin III Regulation must be interpreted and applied with the respect to fundamental rights guaranteed by the Charter. The prohibition of inhuman or degrading treatment or punishment, laid down in Article 4 of the Charter, is, in that regard, of fundamental importance, to the extent that it is absolute in that it is closely linked to respect for human dignity, which is the subject of Article 1 of the Charter.

It follows from the case-law of the European Court of Human Rights relating to Article 3 of the ECHR, which must be taken into account when interpreting Article 4 of the Charter that the suffering which flows from naturally occurring illness, whether physical or mental, may be covered by Article 3 of the ECHR if it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible. Taking account of the general and absolute nature of Article 4 of the Charter, those points of principle are also relevant in the context of the Dublin system.

Even where there are no serious grounds for believing that there are systemic failures in the asylum procedure and the conditions for the reception of applicants for asylum, **the transfer of an asylum seeker within the framework of the Dublin III Regulation can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, within the meaning of that Article 4.** Moreover, in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned, that transfer would constitute inhuman and degrading treatment, within the meaning of Article 4. It is for the authorities of Member States to eliminate any serious doubt as to the impact of the transfer on the health status of the person concerned, by ensuring that the asylum seeker is accompanied during the actual transfer by the appropriate medical staff who have the necessary equipment, resources and medicines, to prevent any aggravation of his health or any act of violence towards himself or third parties. Member States must also ensure that the asylum seeker receives care upon arrival in the responsible Member State.



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If necessary, a Member State should suspend the transfer for as long as the applicant's health condition does not render him capable of such a transfer. The requesting Member State may also choose to examine the application itself by making use of the 'discretionary clause' under Article 17(1) of the Dublin III Regulation - that provision cannot be interpreted to imply an obligation for that Member State to do so.

Follow-Up Question

- In your national context, how do you deal with such situations?

For a critical assessment of the case you can check the following article:

- *One can check case-law of the European Court of Human Rights relating to Article 3*
- *Interesting to look at this case in comparison to Abdullahi case (individual situation of the applicant vs systematic deficiencies of the system)*

See *C.K., H.F., A.S. v Republika Slovenija*, Case number CJEU - C-578/16 PPU, Judgment 16.02.2017.