



Discretionary clause

Fact of the case

C.K., a national of the Syrian Arab Republic, and H.F., a national of the Arab Republic of Egypt, entered the territory of the European Union by means of a visa validly issued by the Republic of Croatia. After a short stay in Croatia, they crossed the Slovenian border equipped with false Greek identification cards. C.K. and H.F. were subsequently admitted to the reception centre for asylum seekers in Ljubljana (Slovenia) and each submitted an asylum application to the Ministry of the Interior of the Republic of Slovenia. C. K. was pregnant at the time of her entry into the territory of Slovenia.

The Slovenian authorities took view that the Republic of Croatia was, pursuant to Article 12(2) of the Dublin III Regulation, the Member State responsible for examining the application for asylum of the appellants in the main proceedings and they sent a request to the authorities of that Member State to take charge of them. Croatia accepted its responsibility in regard to those persons.

Taking into account the advanced pregnancy of C.K., the Republic of Slovenia did not, however, pursue the procedure under the Dublin III Regulation until after 20 November 2015, the date on which the appellant in the main proceedings gave birth to her child A.S

By judgment of 2 March 2016, the Upravno sodišče (Administrative Court, Slovenia) annulled the transfer decision and referred the case back for re-examination by instructing the competent authorities to obtain an assurance from the Republic of Croatia that C.K., H.F. and their child would have access to adequate medical care in that Member State.

In the context of that appeal, the appellants in the main proceedings claimed in particular that their transfer would have negative consequences for the state of health of C.K., also likely to affect the well-being of her new-born child. In this regard, they argued, supported by a number of medical certificates, that C.K. had had a high-risk pregnancy and that she has suffered psychiatric difficulties since giving birth. A specialist psychiatrist, it was stated, had accordingly diagnosed her as having post-natal depression and periodic suicidal tendencies. Furthermore, it is apparent from several medical opinions that the poor state of health of C.K. is mainly caused by uncertainty regarding her status and the resulting stress.

By judgment of 1 June 2016, the Upravno sodišče (Administrative Court) annulled the decision to transfer the appellants in the main proceedings. By an order of the same day,



that court also suspended the enforcement of that decision until a final judicial decision had been adopted on the substance of the dispute.

The Ministry of the Interior thereupon brought an appeal against that judgment before the Vrhovno sodišče (Supreme Court, Slovenia).

The Supreme Court confirmed that transfer decision. As regards the care that the state of health of C. K. requires, it held that it was apparent from a report of the Office of the United Nations High Commissioner for Refugees (UNHCR), received pursuant to a request by the Slovenian authorities, that the situation in the Republic of Croatia concerning the reception of asylum seekers was good. According to that report, that Member State had, in, inter alia, Kutina (Croatia), an accommodation centre designed specifically for vulnerable persons, where asylum seekers had free access to medical care provided by a doctor regularly visiting the centre or, in the event of emergencies, by the local hospital or even, if necessary, by the hospital in Zagreb (Croatia).

As regards other allegations of the appellants in the main proceedings, according to which they were victims of racially motivated remarks and abuse in Croatia, the Vrhovno sodišče (Supreme Court) held that they had not demonstrated that there were substantial grounds for believing that, in Croatia, systemic flaws existed in the asylum procedure and in the conditions for the reception of asylum seekers that were likely to give rise, for the latter, to a risk of inhuman or degrading treatment within the meaning of Article 3(2) of the Dublin III Regulation. Moreover, neither the EU institutions nor the UNHCR regarded the situation in that Member State as critical.

The appellants in the main proceedings lodged a constitutional appeal with the Ustavno sodišče (Constitutional Court, Slovenia).

By decision of 28 September 2016, that court held that, admittedly, it had not been proven in this case that there are, in Croatia, systemic flaws in the asylum procedure and in the conditions for the reception of applicants within the meaning of Article 3(2) of the Dublin III Regulation. Nevertheless, it held, this was not the only ground that could be invoked by the appellants in the main proceedings to show that their transfer to that Member State would expose them to a real risk of inhuman or degrading treatment. There is an obligation on the competent authorities and the national court to examine all the circumstances of significance for observance of the principle of non-refoulement, including the state of health of the person concerned, in the case where an asylum seeker claims that the Member State responsible for his application is not a 'safe State' for him. In that context, those authorities must take into account the applicant's personal situation in Slovenia and assess whether the mere fact of transferring that person might in itself be contrary to the principle of non-refoulement.

The Ustavno sodišče (Constitutional Court) set aside the judgment of the Vrhovno sodišče (Supreme Court) and referred the case in the main proceedings back to that court for judgment in accordance with the considerations set out in its decision.

Legal Framework

International law

the Geneva Convention

Article 33

‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’

The ECHR

Article 3

‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’

Relevant European Law

The Dublin III Regulation

Recitals 4, 5, 9, 32 and 39

(4) The Tampere conclusions also stated that the [common European asylum system] should include, in the short term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.

(5) 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.

...

(9) In the light of the results of the evaluations undertaken of the implementation of the first-phase instruments, it is appropriate, at this stage, to confirm the principles underlying [the Dublin II Regulation], while making the necessary improvements, in the light of experience, to the effectiveness of the Dublin system and the protection granted to applicants under that system. ... A comprehensive “fitness check” should be foreseen by conducting an evidence-based review covering the legal, economic and social effects of the Dublin system, including its effects on fundamental rights.

...

(32) With respect to the treatment of persons falling within the scope of this 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.

...

(39) This Regulation respects the fundamental rights and observes the principles recognized by the [Charter]. In particular, this Regulation seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the [Charter] as well as the rights recognised under Articles 1, 4, 7, 24 and 47 thereof. This Regulation should therefore be applied accordingly.'

Article 3

'1. Member States shall 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. 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. ...

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.

...'

Article 12 (2)

'Where the 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 ...'

Article 17 (1)

'By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.

...'

Article 27 (1)

'The applicant or another person as referred to in Article 18(1)(c) or (d) shall 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.'

Article 29

'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 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).

If transfers to the Member State responsible are carried out by supervised departure or under escort, Member States shall ensure that they are carried out in a humane manner and with full respect for fundamental rights and human dignity.

...

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 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.

...

4. The Commission shall, by means of implementing acts, establish uniform conditions for the consultation and exchange of information between Member States, in particular in the event of postponed or delayed transfers, transfers following acceptance by default, transfers of minors or dependent persons, and supervised transfers. ...'

Article 31

'1. The Member State carrying out the transfer of an applicant ... shall communicate to the Member State responsible such personal data concerning the person to be transferred as is appropriate, relevant and non-excessive for the sole purposes of ensuring that the competent authorities, in accordance with national law in the Member State responsible, are in a position to provide that person with adequate assistance, including the provision of immediate health care required in order to protect his or her vital interests, and to ensure continuity in the protection and rights afforded by this Regulation and by other relevant asylum legal instruments. Those data shall be communicated to the Member State responsible within a reasonable period of time before a transfer is carried out, in order to ensure that its competent authorities in accordance with national law have sufficient time to take the necessary measures.

2. The transferring Member State shall, in so far as such information is available to the competent authority in accordance with national law, transmit to the Member State responsible any information that is essential in order to safeguard the rights and immediate special needs of the person to be transferred, and in particular:

(a) any immediate measures which the Member State responsible is required to take in order to ensure that the special needs of the person to be transferred are adequately addressed, including any immediate health care that may be required;

...'

Article 32 (1)

'For the sole purpose of the provision of medical care or treatment, in particular concerning disabled persons, elderly people, pregnant women, minors and persons who have been subject to torture, rape or other serious forms of psychological, physical and sexual violence, the transferring Member State shall, in so far as it is available to the competent authority in accordance with national law, transmit to the Member State responsible information on any special needs of the person to be transferred, which in specific cases may include information on that person's physical or mental health. That information shall be transferred in a common health certificate with the necessary documents attached. The Member State responsible shall ensure that those special needs are adequately addressed, including in particular any essential medical care that may be required.

...'

The 'reception' directive

Article 17

‘1. Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection.

2. Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.

Member States shall ensure that that standard of living is met in the specific situation of vulnerable persons, in accordance with Article 21 ...

...’

Article 18 (3)

‘Member States shall take into consideration gender and age-specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres referred to in paragraph 1(a) and (b).’

Article 19

‘1. Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders.

2. Member States shall provide necessary medical or other assistance to applicants who have special reception needs, including appropriate mental health care where needed.’

Questions

1. Does the Charter of Fundamental Rights apply in this case, and if yes which Articles?
2. In your opinion, whether the application, by a Member State, of the ‘discretionary clause’ laid down in Article 17 (1) of the Dublin III Regulation is governed solely by national law and the interpretation given to it by the constitutional court of that Member State, or whether it is a question concerning the interpretation of EU law, within the meaning of Article 267 TFEU?
3. What do you think – would a transfer of an asylum seeker, as in this case, with serious mental/physical illness that would result in a real and proven risk to the state of health constitute inhuman and degrading treatment within the Article 4 of the Charter?