



Dublin? Transfer?

Fact of the case

Ms Abdullahi is a Somali national aged 22. She entered Syria by air in April 2011 and then travelled through Turkey in July of the same year before entering Greece illegally by boat. With the assistance of people smugglers, she travelled to Austria, in the company of other persons, passing through the Former Yugoslav Republic of Macedonia, Serbia and Hungary. She crossed the borders of all of those countries illegally. Ms Abdullahi was arrested in Austria, close to the Hungarian border, by Austrian police officials who established the route taken by Ms Abdullahi by also interviewing other persons who had made the same journey.

In Austria, she lodged an application for international protection with the Bundesasylamt, the competent authority. The Bundesasylamt requested that Hungary take charge of Ms Abdullahi in accordance with Article 10(1) of Regulation No 343/2003. Hungary agreed to do so. The Bundesasylamt rejected as inadmissible Ms Abdullahi's asylum application in Austria and ordered her removal to Hungary. Ms Abdullahi brought an appeal against that decision, which the Asylgerichtshof allowed on the account of procedural issues. The Bundesasylamt then reviewed the decision and still pursued transfer to Hungary. A further appeal was brought but this time Ms Abdullahi claimed that the Member State responsible was Greece and not Hungary. She argued that as she could not be sent back there (as they did not observe human rights in certain respects) and accordingly Austria had to examine her asylum application. The Asylgerichtshof declared the appeal unfounded and therefore Ms Abdullahi brought an appeal before the Verfassungsgerichtshof (Constitutional Court).

The Verfassungsgerichtshof set aside the judgment of the Asylgerichtshof on the ground that the Court should have referred to the Court of Justice for the preliminary ruling. Following that the Asylgerichtshof decided to stay the proceedings and send questions to the Court for a preliminary ruling.

Legal Framework

International law

The Geneva Convention



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of the European Union



Ludwig Boltzmann Institute
Human Rights



CENTRE FOR
EUROPEAN
CONSTITUTIONAL
LAW



INPRIS



National Research Council of Italy
ISGI
Institute for International Legal Studies



REPUBLIC OF AUSTRIA
FEDERAL MINISTRY OF JUSTICE



REPUBLIKA HRVATSKA
Pučki pravobranitelji

Relevant European Law

Regulation No 343/2003

Article 3(1)

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

Article 10

‘1. Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 18(3), including the data referred to in Chapter III of [Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention (OJ 2000 L 316, p. 1)], that an asylum seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for asylum. This responsibility shall cease 12 months after the date on which the irregular border crossing took place.

2. When a Member State cannot or can no longer be held responsible in accordance with paragraph 1, and where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 18(3), that the asylum seeker – who has entered the territories of the Member States irregularly or whose circumstances of entry cannot be established – at the time of lodging the application has been previously living for a continuous period of at least five months in a Member State, that Member State shall be responsible for examining the application for asylum.

If the applicant has been living for periods of time of at least five months in several Member States, the Member State where this has been most recently the case shall be responsible for examining the application.’

Article 13 of Regulation No 343/2003 provides that, where no Member State can be designated consistently with the order of priority in which the criteria are listed in that regulation, the default rule is that the first Member State with which the application for asylum was lodged is to be responsible for examining that application.

Article 16

‘1. The Member State responsible for examining an application for asylum under this Regulation shall be obliged to:

- (a) take charge, under the conditions laid down in Articles 17 to 19, of an asylum seeker who has lodged an application in a different Member State;
- (b) complete the examination of the application for asylum;

...

2. Where a Member State issues a residence document to the applicant, the obligations specified in paragraph 1 shall be transferred to that Member State.

3. The obligations specified in paragraph 1 shall cease where the third-country national has left the territory of the Member States for at least three months, unless the third-country national is in possession of a valid residence document issued by the Member State responsible.

...’

In accordance with Article 17 of Regulation No 343/2003, where a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may – as quickly as possible and in any case within three months of the date on which the application was lodged – call upon the other Member State to take charge of the applicant.

Article 18

‘1. 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 the date on which the request was received.

2. In the procedure for determining the Member State responsible for examining the application for asylum established in this Regulation, elements of proof and circumstantial evidence shall be used.

3. In accordance with the procedure referred to in Article 27(2) two lists shall be established and periodically reviewed, indicating the elements of proof and circumstantial evidence in accordance with the following criteria:

(a) Proof:

(i) This refers to formal proof which determines responsibility pursuant to this Regulation, as long as it is not refuted by proof to the contrary.

(ii) The Member States shall provide the Committee provided for in Article 27 with models of the different types of administrative documents, in accordance with the typology established in the list of formal proofs.

(b) Circumstantial evidence:

(i) This refers to indicative elements which while being refutable may be sufficient, in certain cases, according to the evidentiary value attributed to them.

(ii) Their evidentiary value, in relation to the responsibility for examining the application for asylum shall be assessed on a case-by-case basis.

4. The requirement of proof should not exceed what is necessary for the proper application of this Regulation.

5. If there is no formal proof, the requested Member State shall acknowledge its responsibility if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility.

...

7. Failure to act within the two-month period mentioned in paragraph 1 and the one-month period mentioned in paragraph 6 shall be tantamount to accepting the request, and entail the obligation to take charge of the person, including the provisions for proper arrangements for arrival.’

Article 19(1) to (4)

‘1. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State.

2. The decision referred to in paragraph 1 shall set out the grounds on which it is based. It shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case by case basis if national legislation allows for this.

3. The transfer of the applicant from the Member State in which the application for asylum was lodged to the Member State responsible shall be carried out in accordance with the national law of the first 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 that charge be taken or of the decision on an appeal or review where there is a suspensive effect.

...

4. Where the transfer does not take place within the six months' time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. 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 asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.'

Regulation No 1560/2003

Article 3

'1. The arguments in law and in fact set out in the request shall be examined in the light of the provisions of Regulation (EC) No 343/2003 and the lists of proof and circumstantial evidence which are set out in Annex II to the present Regulation.

2. Whatever the criteria and provisions of Regulation (EC) No 343/2003 that are relied on, the requested Member State shall, within the time allowed by Article 18(1) and (6) of that Regulation, check exhaustively and objectively, on the basis of all information directly or indirectly available to it, whether its responsibility for examining the application for asylum is established. If the checks by the requested Member State reveal that it is responsible under at least one of the criteria of that Regulation, it shall acknowledge its responsibility.'

Article 4

'Where a request for taking back is based on data supplied by the Eurodac Central Unit and checked by the requesting Member State, in accordance with Article 4(6) of Regulation (EC) No 2725/2000, the requested Member State shall acknowledge its responsibility unless the checks carried out reveal that its obligations have ceased under the second subparagraph of Article 4(5) or under Article 16(2), (3) or (4) of Regulation (EC) No 343/2003. The fact that obligations have ceased on the basis of those provisions may be relied on only on the basis of material evidence or substantiated and verifiable statements by the asylum seeker.'

Article 5

'1. Where, after checks are carried out, the requested Member State considers that the evidence submitted does not establish its responsibility, the negative reply it sends to the requesting Member State shall state full and detailed reasons for its refusal.

2. Where the requesting Member State feels that such a refusal is based on a misappraisal, or where it has additional evidence to put forward, it may ask for its request to be re-examined. This option must be exercised within three weeks following receipt of the negative reply. The requested Member State shall endeavour to reply within two weeks. In any event, this additional procedure shall not extend the time limits laid down in Article 18(1) and (6) and Article 20(1)(b) of Regulation (EC) No 343/2003.'

Article 14

'1. Where the Member States cannot resolve a dispute, either on the need to carry out a transfer or to bring relatives together on the basis of Article 15 of Regulation (EC) No 343/2003, or on the Member State in which the persons concerned should be reunited, they may have recourse to the conciliation procedure provided for in paragraph 2 of this Article.

2. The conciliation procedure shall be initiated by a request from one of the Member States in dispute to the Chairman of the Committee set up by Article 27 of Regulation (EC) No 343/2003. By agreeing to use the conciliation procedure, the Member States concerned undertake to take the utmost account of the solution proposed.

The Chairman of the Committee shall appoint three members of the Committee representing three Member States not connected with the matter. They shall receive the arguments of the parties either in writing or orally and, after deliberation, shall propose a solution within one month, where necessary after a vote.

The Chairman of the Committee, or his deputy, shall chair the discussion. He may put forward his point of view but he may not vote.

Whether it is adopted or rejected by the parties, the solution proposed shall be final and irrevocable.'

Directive 2005/85

Recital 29 in the preamble to Directive 2005/85

'This Directive does not deal with procedures governed by [Regulation No 343/2003

Relevant national law

Bundesgesetz über die Gewährung von Asyl (Federal Law on the Granting of Asylum; BGB1. I, 100/2005)

Paragraph 18(1)

'The Bundesasylamt and the Asylgerichtshof [(Asylum Court)] must at all stages of the procedure ensure *ex officio* that the information relevant to the decision is provided or that incomplete information concerning the circumstances relied on in support of the application is supplemented, that the evidence to substantiate such information is specified or that the evidence offered is supplemented and, in general, that any clarifications required in support of the application are provided. If necessary, evidence must also be obtained *ex officio*.'

Questions

1. Does the Charter of Fundamental Rights apply in this case, and if yes which Articles?
2. In your view who is responsible for examining an asylum application under Regulation 343/2003?
3. In your opinion, can an applicant for asylum call into question the choice of the criterion laid down in Article 10(1) of the regulation?